INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes and Rules Involved	2
Statement of the Case	3
Reasons for Granting the Writ	4
I. The trial court erred in granting summary judgment, denying intervention and preventing assertion of a compulsory counterclaim, thus necessitating a multiplicity of suits, in violation of Rules 1 and 13	4
Conclusion	10
Appendix	1a

AUTHORITIES CITED

Cases:

Affiliated Music Enterprises v. *Sesac, Inc.*, 17 F.R.D. 509 (S.D.N.Y. 1955)	7
Checker Motors Corp. v. *Chrysler Corp.*, 39 F.R.D. 37, 38 (S.D.N.Y. 1965)	6
H. L. Peterson Co. v. *Applewhite*, 383 F. 2d 430, 433 (5th Cir. 1967)	8
Lesnik v. *Public Industrial Corp.*, 144 F. 2d 968, 975 (2nd Cir. 1944)	7
Lyons v. *Marrud, Inc.*, 46 F.R.D. 452, 454 (S.D.N.Y. 1968)	6
Mansion Carpets v. *Marinoff*, 24 App. Div. 2d 947, 265 N.Y.S. 2d 298 (1965)	9
Moore v. *New York Cotton Exchange*, 270 U.S. 593, 610 (1926)	8, 9
Southern Construction Co. v. *Pickard*, 371 U.S. 57, 60 (1962)	6

Page

Union Paving Co. v. *Downer Corp.*, 276 F. 2d 468 (9th Cir. 1960) 8
United States v. *American Surety Co.*, 142 F. 2d 726, 728 (2d Cir. 1944) 9
Washington Gaslight Co. v. *District of Columbia*, 161 U.S. 316 (1896) 9

STATUTES:

McKinney's Consolidated Laws of New York, Vol. 62½, Uniform Commercial Code, § 3-306, § 3-408 .. 10

TREATISES:

3 Moore on Federal Practice (2d ed. 1967), par. 13.13, p. 33 6
12 Am. Jur. 2d, Bills and Notes, § 1187 10

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 1 .....2, 10
Rule 13(a) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. _____

D. H. OVERMYER CO., INC., a New York corporation, D. H. OVERMYER CO., INC., an Ohio corporation, GREEN & WHITE CONSTRUCTION CO., INC., a Delaware corporation

and

THE SEAMAN'S BANK FOR SAVINGS IN THE CITY OF NEW YORK, QUICKWAY EXCAVATORS, INC., NUCLEAR CORPORATION OF AMERICA, M. KRAMER & SONS, INC., THE PEOPLE OF THE STATE OF NEW YORK, and THE STATE TAX COMMISSION, *Petitioners*

v.

RICHARD J. WOODWARD, NED P. CLYDE, JAMES L. SHERARD, RAYMOND LUNDGREN, DOUGLAS C. MOOREHOUSE, and DAVID M. GREER, doing business as Woodward-Clyde-Sherard & Associates, a partnership, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit dated June 9, 1970, affirming a summary judgment entered by the United States District Court for the Northern District of New York, ordering foreclosure of a real estate mortgage.

OPINIONS BELOW

The opinion of the Court of Appeals dated June 9, 1970 is set forth in the Appendix to this Petition (App. 22a). It appears to be unreported at this time. The orders of the District Court are likewise set forth in the Appendix (App. 3a, 11a). They are not reported.

JURISDICTION

The District Court ordered foreclosure and denied a motion of Green & White for leave to intervene on January 23, 1970. Thereafter, on February 20, 1970, the District Court granted a rehearing, and adhered to its decision denying intervention. These are the orders subsequently affirmed on appeal June 9, 1970.

This Court's jurisdiction is invoked under Title 28, U.S. Code § 1254(1). Under date of September 16, 1970, Mr. Justice John M. Harlan enlarged the time for filing this application to and including October 8, 1970.

QUESTIONS PRESENTED

In a suit to foreclose a real estate mortgage, where defendant seeks, directly or by intervention of an affiliated company, to defend by counterclaim arising from the same transaction that generated the mortgage debt, may the Court, conformably with Rules 1 and 13 of the Federal Rules of Civil Procedure, refuse to entertain such counterclaim, even though plaintiffs have successfully resisted service thereon in another court, and grant summary judgment of foreclosure for plaintiffs?

STATUTES AND RULES INVOLVED

New York provisions of the Uniform Commercial Code, § 3-306 and § 3-408, are set forth in the Appendix, together with Rule 13(a) of the Federal Rules of Civil Procedure. (App. 30a-31a)

STATEMENT OF THE CASE

Petitioners, D. H. Overmyer Co., Inc., are affiliated corporations in a national chain of warehouse companies, the Ohio corporation being the parent company and sole stockholder in all the others,[1] as well as in Green & White, its construction subsidiary.

In the course of a national program involving construction of approximately two hundred warehouses, respondents, an engineering partnership (herein called Woodward-Clyde), practicing throughout the United States and in foreign countries, was engaged to perform soil tests and site examinations at numerous locations in many states. The partners are all residents of New Jersey and California.

The actual construction program contracts (including the soil studies by respondents) were made by petitioner Green & White Construction Co., Inc., a Delaware corporation (herein called Green & White), a wholly owned subsidiary of the Overmyer company.

Green & White became insolvent and Overmyer of Ohio assumed all obligations owing to respondent engineers. In so doing, Overmyer was required to execute 13 promissory notes in the total amount of $243,654, and to post as security for payment a second mortgage on the warehouse premises here under foreclosure, owned by Overmyer of New York.

When foreclosure was started, Overmyer sought to defend by having Green & White intervene and show failure of consideration for the mortgage debt. This was denied by the District Court and affirmed on appeal.

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[1] The other petitioners are nominal parties here, being named as defendants below.

REASONS FOR GRANTING THE WRIT

I

The Trial Court Erred in Granting Summary Judgment, Denying Intervention and Preventing Assertion of a Compulsory Counterclaim, Thus Necessitating a Multiplicity of Suits, in Violation of Rules 1 and 13.

This case was resolved on the pleadings alone, in complete disregard of the merits of conflicting claims. By granting summary judgment of foreclosure, the trial court refused to entertain a counterclaim arising out of the identical transaction.

Plaintiff engineers (respondents here) had successfully resisted service in the U.S. District Court for Massachusetts, pleading they were not there subject to service, and that service on two of the six partners was insufficient to bring the partnership into court. When the six partners invoked the powers of the New York District Court to foreclose, it was completely in keeping with Rules 1 and 13, Federal Rules of Civil Procedure, to ask that they respond on a claim arising directly out of the same transaction as the foreclosure. The District Court was fully informed. The most significant reason assigned for rejecting the counterclaim was that it was the subject of the Massachusetts action then pending. While that was the fact when the motion was argued, it was not so a year later when it was denied. The case had been discontinued there by virtue of the dispersal of the six engineers outside of Massachusetts, and their denial of amenability to process in that jurisdiction. By that time they had voluntarily appeared in the New York court, and this was a proper place to assert the related counterclaim. Green & White was the correct party in the first instance to make that claim, and for that purpose sought

to intervene, showing plainly its common ownership with Overmyer and the posting of Overmyer's real estate as security for Green & White's debt. The relationship was fully spelled out.

Green & White's motion to intervene (App. 13a), with complaint annexed, (App. 17a) clearly shows that its claim of professional negligence arose out of the same transaction which gave rise to the mortgage, alleging that due to the professional negligence of the engineers, Green & White became insolvent and called upon its affiliate, Overmyer of Ohio, owned by the same stockholders as Green & White, which then caused Overmyer of New York to execute the mortgage here in issue as security for payments then believed to be due the engineers (App. 19a-20a). Clearly this counterclaim went to the very heart of the plaintiffs' foreclosure action. It should have been heard and decided as part and parcel of the same proceeding. The basic concept of the Federal Rules of Civil Procedure, as expressed in Rule 1, required such attention. Anent these Rules, it says:

> "They shall be construed to secure the just, speedy, and inexpensive determination of every action."

In this context rejection is contrary to Rule 13(a) on compulsory counterclaims, requiring the pleading of such a counterclaim,

> " . . . if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . "

Examination of this motion to intervene, with the proposed complaint attached (App. 14a), clearly sets forth the facts showing the note and mortgage upon which

the foreclosure is based was given in payment for services which turned out to be professionally wanting, and caused great damage. There was a failure of consideration for the note and direct counterclaim for damages. But this plea was rejected on the most hypertechnical reasoning, and summary judgment was granted to foreclose this mortgage on property valued at approximately one million dollars ($1,000,000) (App. 19a).

It appears that the procedure below conflicts directly with this Court's ruling in *Southern Construction Co.* v. *Pickard*, 371 U.S. 57, 60 (1962). The Court of Appeals had reversed a lower court ruling allowing a counterclaim in a suit to recover on a construction contract. In reversing the Court of Appeals, this Court expounded the policy which should have been followed below:

> (p. 60). "The requirement that counterclaims arising out of the same transaction or occurrence as the opposing party's claim 'shall' be stated in the pleadings was designed to prevent multiplicity of actions and to *achieve resolution in a single lawsuit of all disputes arising out of common matters.*" (emphasis supplied).

This rule has been well recognized and applied for the purpose of avoiding multiplicity of actions. *Checker Motor Corp.* v. *Chrysler Corporation*, 39 FRD 37, 38 (S.D.N.Y. 1965); *Lyons* v. *Marrud, Inc.*, 46 FRD 451, 454 (S.D.N.Y. 1968).

Only a super-technical application of the rules would deny this counterclaim on the ground it is "permissive," as the trial court did. 3 Moore on Federal Practice (2d ed. 1967) par. 13.13, p. 33, defines the canon of construction:

> " . . . courts should give the phrase 'transaction or occurrence that is the subject matter' of the suit

> a broad realistic interpretation in the interest of avoiding a multiplicity of suits."

This is the healthy view of procedure applied in *Affiliated Music Enterprises* v. *Sesac, Inc.*, 17 F.R.D. 509 (S.D.N.Y. 1955), where the court said:

> (p. 511) "The motion to dismiss the counterclaim is denied because the counterclaim is a compulsory one arising out of the same transactions and course of dealing as plaintiff's complaint.
>
> * * *
>
> "Rule 13(a) FRCP has been viewed liberally in the interest of avoiding multiplicity of suits and disposing of all claims between the parties which are logically related."

The decision below necessitates a multiplicity of suits and refuses to follow the eminently sound and sensible course of resolving the entire controversy in a single proceeding. It clearly conflicts with this Court's Rules, its policy, and the decision quoted above.

This principle has been fully recognized and applied in the Second Circuit, where refusal to consider counterclaims was reversed on the precise ground here urged— they arose out of the same transaction or occurence. *Lesnik* v. *Public Industrial Corp.*, 144 F. 2d 968, 975 (2nd Cir. 1944). Of course, the counterclaim in the case at bar sounded in contract for damages, an action at law, while the original suit was in equity for foreclosure. The distinction has no bearing here, as the Second Circuit noted in the *Lesnik Case, supra,* speaking of Rule 13(a):

> (p. 975) "This rule is a broadening of former Equity Rule 30 to include 'occurrence' as well as

> 'transaction,' and to apply to all civil actions, not merely to suits in equity.
>
> * * *
>
> "Under this view the counterclaims here may be viewed as arising out of the *occurrence*, and surely out of the transaction, by which Lesnik took the note upon which the complaint was based.
>
> * * *
>
> (p. 976) "Here, had Public Industrials failed to plead its counterclaims attacking Lesnik's acquisition of the note in his suit on it, it ought not to be allowed to raise the matter later. Hence the counterclaim is compulsory, and, therefore, fairly 'ancillary' to the main action."

Avoiding a multiplicity of suits has been long recognized by this Court as a prime objective in judicial administration, and former Equity Rule 30 was so interpreted in *Moore* v. *New York Cotton Exchange*, 270 U.S. 593, 610 (1926), where the Court said:

> (p. 610) " 'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon *their logical relationship.*" (emphasis supplied)

The Ninth Circuit applied the same reasoning in reversal of a trial court ruling dismissing such counterclaims. *Union Paving Co.* v. *Downer Corp.*, 276 F. 2d 468 (9th Cir. 1960).

In the case at bar, the counterclaim was a direct assertion that the very basis of the plaintiff's case was legally unsound. Right or wrong, it should have been considered and resolved under Rule 13(a). Exactly that situation was presented in *H. L. Peterson Co.* v. *Applewhite*, 383 F. 2d 430, 433 (5th Cir. 1967), where

suit on a note was met by a counterclaim of fraud and failure of consideration. The Fifth Circuit held it was a "compulsory" counterclaim, quoting this Court in *Moore* v. *New York Cotton Exchange, supra,* (p. 610), where it was said:

> "So close is the connection between the case sought to be stated in the bill and that set up in the counterclaim, that it only needs the failure of the former to establish a foundation for the latter . . . "

Unquestionably that analysis applies directly to the case at bar—failure by the plaintiff would automatically establish the counterclaim, and success in the counterclaim would show plaintiff's case was without merit. *Mansion Carpets* v. *Marinoff,* 24 App. Div. 2d 947, 265 N.Y.S. 2d 298 (1965).

In a case closely parallel to ours on the facts, the Second Circuit approved trial court action allowing intervention by a third party to counterclaim where the defense claimed damages for breach of the same contract sued upon. *United States* v. *American Surety Co.,* 142 F. 2d 726, 728 (2d Cir. 1944).

As to the right of Green & White to appear and defend after it had knowledge of the action, this Court so held in *Washington Gaslight Co.* v. *District of Columbia,* 161 U.S. 316 (1896).

> (p. 329) "As a deduction from the recognized right to recover over, it is settled that, where one having such right is sued, the judgment rendered against him is conclusive upon the person liable over, provided notice be given to the latter, and full opportunity be afforded him to defend the action."

That rule should certainly have prompted recognition of Green & White as the party liable over to Over-

myer. On this basis the proffered counterclaim is recognizable as clearly a "compulsory" one, which would be lost if not pleaded under the Rule.

Provisions of the Uniform Commercial Code, McKinney's Consolidated Laws of New York, Vol. 62½, § 3-306, § 3-408 (App. 30a) clearly place the burden of proving failure of consideration on the defendant. 12 Am. Jur. 2d, Bills and Notes, §1187. The decision below singularly deprived petitioners of all opportunity so to defend, and the delayed decision may well enable respondents successfully to plead limitations, as their counsel has promised.

CONCLUSION

This Court should exercise its power of supervision to correct the lower courts' misapplication of Federal Rules of Civil Procedure, by which the lower court denied petitioners all opportunity to defend and counterclaim, requiring a multiplicity of suits, in place of one, to resolve the controversy.

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October 7, 1970

APPENDIX

Memorandum-Decision and Order (Foley, Dist. Judge), Nov. 20, 1969 ..... 2a

Memorandum-Decision and Order (Foley, D. J.), Feb. 20, 1970 ..... 10a

Memorandum of Foley, D. J., Jan. 23, 1970 ..... 11a

Motion To Intervene as a Plaintiff With Complaint Attached 13a

Opinion of the Court of Appeals, June 9, 1970 ..... 22a

Rule 13, Federal Rules of Civil Procedure 30a

McKinney's Consolidated Laws of New York, Uniform Commercial Code, § 3-306, § 3-408 ..... 30a

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

68-CV-1

RICHARD J. WOODWARD, NED P. CLYDE, JAMES L. SHERARD, RAYMOND LUNDGREN, DOUGLAS C. MOORHOUSE, and DAVID M. GREER, doing business as WOODWARD-CLYDE-SHERARD & ASSOCIATES, a partnership, *Plaintiffs*,

v.

D. H. OVERMYER CO. INC., a New York corporation, D. H. OVERMYER CO. INC., an Ohio corporation, THE SEAMEN'S BANK FOR SAVINGS IN THE CITY OF NEW YORK, QUICK-WAY EXCAVATORS, INC., NUCLEAR CORPORATION OF AMERICA, M. KRAMER & SONS, INC., THE PEOPLE OF THE STATE OF NEW YORK and the STATE TAX COMMISSION, *Defendants*.

Appearances:

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Attorney for Plaintiffs

William D. Powers
Of Counsel

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Attorneys for Defendants,
OVERMYER COMPANIES and
for Intervenor
GREEN & WHITE CONSTRUCTION COMPANY

John Cebula
Edward M. Connery
Russell Morton Brown
Brown, Goodpasture & Block
Of Counsel

James T. Foley, D. J.

Memorandum-Decision and Order

There is nothing extraordinary about this action. It is one for foreclosure of a mortgage on improved real property located in the County of Albany. It was commenced originally in the Supreme Court, Albany County. By petition of D. H. Overmyer Co. Inc., an Ohio corporation, hereinafter referred to as Overmyer Ohio for convenience, and D. H. Overmyer Co. Inc., a New York corporation, referred to as Overmyer New York, the action was removed to this District Court on diversity and sufficient monetary amount grounds. The relief sought in the complaint is the ordinary and customary relief sought under New York law and procedures in mortgage foreclosure actions.

The complaint alleges, with reference to a letter agreement dated February 21, 1967, accepted by Overmyer Ohio and the actual notes attached thereto as exhibits, that Overmyer Ohio, by its President and Treasurer executed and delivered to the plaintiffs, a professional engineering nartnership, thirteen serial promissory notes to be paid at different time intervals in amounts of $10,000.00 and $20,000.00 at 6% interest. Such acts were done and instruments executed to secure a payment claimed to be due plaintiffs for their services.

The allegations in the complaint charged that on May 23, 1967, as collateral security for $183,654.35, the amount then due on the promissory notes, five to thirteen inclusive, Defendant Overmyer New York executed and delivered to the plaintiffs the mortgage sought in this removed action to be foreclosed. A copy of this second mortgage is attached to the complaint as Exhibit "B". Thereafter, it is alleged that a $20,000.00 note due on September 20, 1967, was presented for payment and payment was refused, according to the Notice of Protest, Ex. "C". At the time the complaint was filed there was due on the notes and mortgage $123,654.35, with interest from February, 1967.

There is no dispute concerning the execution and authenticity of the documents above mentioned. There is dispute concerning the legal propriety of the place where the note was presented for payment and upon which the default in payment is based, with further contention that the payee had not endorsed the note and therefore the Bank of presentment was not authorized to demand payment of the particular note. It should be noted that this action, by stipulation of the attorneys for all parties who appeared, was dismissed with prejudice against The Seamen's Bank for Savings in the City of New York, the assignee of a substantial predecessor mortgage to the one in issue here, and also discontinued under the same terms against Quickway Excavators, Inc., the holder of a valid mechanic's lien assumedly perfected prior to the mortgage here in issue.

There are four motions at hand to decide. I shall describe them briefly in the order in which they shall be discussed herein; such order being based upon my determination and view as to the impact and effect the decision of one has in relationship to the others. The first motion is by defendant Overmyer Ohio and New York under Rule 12(b) of the F.R. Civ. Proc. to dismiss the complaint for failure to state a claim upon which relief can be granted. Of course, it is obvious, ruling in favor of the defendants Overmyer on this motion would end it all. The second motion is by the same defendants, Overmyer, to transfer this action to the United States District Court for Massachusetts under 28 U.S.C.A. 1404(a), for the convenience of parties and witnesses, and in the interests of justice. Again, decision for these defendants would unload the burdens of this litigation from this District Court to another. The third motion is one by a Green & White Construction Co. Inc., to intervene under F.R. Civ. Proc. 24 as a plaintiff in order to assert a counterclaim and cross-action as set forth in a proposed complaint against the plaintiff partnership. It is conceded in this motion that Green & White

Construction Co. Inc. is a corporation owned by the same stockholders as defendants here, Overmyer Ohio and New York. It should be noted at this stage—because it is a factor tending to breed confusion and complication—that Green & White, the applicant intervenor here, and Overmyer, New York, on or about February 20, 1967, prior to the execution of the mortgage in issue in this action on May 23, 1967, instituted an action in the United States District Court for Massachusetts against Goldberg-Zoino & Associates, Inc. and certain of the plaintiffs. The background in that action and its court disposition in Massachusetts I will attempt to detail and clarify later. The fourth motion again is usually dispositive of all problems and is in the form of a cross-motion by the plaintiffs for summary judgment under F.R. Civ. Proc. 56.

I

The motion to dismiss the complaint, in my judgment, is groundless. It is based upon the contentions that the note in question, not paid on the due date, which triggered the foreclosure, was not presented at the proper designated place and inasmuch as the payee had not endorsed it there was no authority in the bank of presentment to demand its payment. It is settled and elementary law that in consideration of a motion to dismiss, the material allegations of a complaint are taken as admitted, the complaint is to be liberally construed in favor of the plaintiff, and the complaint should not be dismissed unless it appears no set of facts could be proved to support a claim entitling to relief. (Conly v. Gibson, 355 U.S. 41, 45-46; Jenkins v. McKeithen, 395 U.S. 411, 421-2). The motion to dismiss is denied and dismissed.

II

The change of venue motion has a number of overwhelming factors against its grant. Under the N.Y. CPLR, Section 507, this action for foreclosure, removed to this

Court, had to be tried in the County of Albany, New York. Equally so, under 28 U.S.C.A. 1392(a), it is implied the action may be brought only in the United States District Court where the property is located. It is unquestionably an action local in its nature. (See 1 Moore's Fed. Prac. 2nd Ed., pgs. 1456-58; 1557-58).

It is doubtful that a transfer to the District Court of Massachusetts would be to a District Court where this foreclosure action might have been brought. (See 28 U.S.C.A. 1404(a); Hoffman v. Blaski, 363 U.S. 335, 341-2). Finally and decisively, the circumstance adverse to a change of venue is the lack of satisfactory demonstration that there are witnesses sufficiently identified who have important testimony to offer. (See Saraf & others v. Chatham Carpet Mills, Inc. (SDNY), 275 F. Supp. 951). The motion for change of venue is denied.

III

As previously indicated, there is some complexity by reason of the Massachusetts court action that must be explained in the consideration of this motion for intervention. The background situation is that the plaintiffs, being professional engineers, entered into an agreement with Green & White, wholly owned by the Overmyer stockholders, to perform soil and foundation investigations throughout the country, in about 28 states, at a large number of sites where Green & White would erect warehouses for Overmyer and its affiliates. In the course of this work the plaintiffs, in other parts of the country, retained outside consultants to perform certain aspects of the investigations. The retainer we are interested in is the one with Goldberg-Zoino Associates, Inc., a Boston company, to perform soil and foundation investigations for certain sites in Framingham, Massachusetts. It is on this particular retainer and the work done by Goldberg-Zoino at Framingham only that the defendants, Overmyer

New York, and Green & White, based their claim in the Massachusetts District Court. The complaint there sought damages in the sum of $300,000.00; the gist of the claim is the plaintiffs were responsible for the alleged negligence and performance of the investigative work done at Framingham by Goldberg-Zoino in that the work was improperly delegated and carelessly supervised by the plaintiff partnership. Overmyer New York, in the same complaint, sought to enjoin the plaintiffs from foreclosing the mortgage involved in this action. It is admitted the complaint of the intervernor, Green & White, filed in Massachusetts, is substantially identical to the one sought to be accepted here as an intervening cross-action.

In the Massachusetts District Court there have been motions filed and decided. The final result was that the Green & White complaint based in negligence was allowed to stand against these plaintiffs after a motion was granted by the District Judge to amend the complaint by adding as named defendants other partners of the plaintiff partnership not named in the original complaint. That complaint is apparently pending and the issues therein open for decision in the Massachusetts District Court. The cause of action alleged in this Massachusetts action by Overmyer New York for injunction against this mortgage foreclosure was dismissed on the merits by the District Judge.

In my judgment, the question of intervention would be one of permissive grant. (F.R. Civ. Proc. 24(b)). From my review there is nothing evident to warrant the grant of intervention based upon grounds of harm or prejudice to any rights of redress Green & White may have for alleged negligence on the Framingham project. Such intervention, even if we did not have the solid reasons I find evident to grant the summary judgment motion, would undoubtedly make cloudy the issues of a straight foreclosure action. It is also difficult for me to

ascertain any common questions of law or fact in the divergent claims of foreclosure and negligence. (Kind v. Markham, (S. D. N. Y.), 7 F.R.D. 265). It is also of great importance, I believe, that the identical claim sought to be interposed by intervention here is pending in Massachusetts eligible for court review and decision there, in its favor if the intervenor is entitled to the relief sought. Such pending similar action is enough in itself to defeat the motion for intervention. (S. C. Johnson & Son, Inc. v. Boe, (D.C.E.D. Pa.), 187 F. Supp. 517; Cresta Blanca Wine Co. Inc. v. Eastern Wine Corp., 2 Cir., 143 F.2d 1012; Isbrandtsen Co. Inc. v. Kokoh Maru, et al, (S.D. N.Y.), 263 F. Supp. 784; 3B Moore's Red. Prac. pg. 392). The motion to intervene is denied.

IV

Summary judgment is still a delicate proposition in the federal system. The reluctance of the past has diminished and the Court of Appeals, Second Circuit, advised that the summary procedure be applied in appropriate situations with "less reticence and more resoluteness." (American Manufacturing Mutual Insurance Co. Inc. v. American Broadcasting—Paramount Theatres, Inc., 2 Cir., (1967), 388 F.2d 272, 278; Dressler v. The MV Sandpiper, 2 Cir., (1964), 331 F.2d 130). I had sufficient fortitude years ago before the above writings. (See Vermont Structural v. Tatko Bros. (N.D.N.Y. 1955), 134 F. Supp. 4; aff'd. 2 Cir., 233 F.2d 9).

In my judgment, based upon an analysis of the record made on these motions, and particularly weighing the substance of the opposition affidavits offered to the summary judgment motion, the plaintiffs are clearly entitled to grant of their cross-motion for summary relief. (F. R. Civ. Proc. 56(e); 6 Moore's Fed. Prac. pg. 2803). If the affidavits in opposition were to be accepted as sufficient, I detect no genuine issue of material fact that would de-

feat the motion. (Community of Roquefort v. William Faehndrich, Inc., 2 Cir., (1962) 303 F.2d 494, 498).

The argument about the place of presentment for payment of the notes being wrong flies in the face of express letter agreement by the general counsel and secretary for the defendants Overmyer, who must be accepted as an officer clearly armed with authority, agreeing to this change of place. The other contentions that failure of endorsement in some undescribed way takes away the authority of the Bank to demand payment seem to me technical and frivolous. The old and new law of New York holds that it is not necessary to make presentation for payment or to give notice of dishonor to the maker of the note. (Ribac v. S & G Parts Manufacturing and Equipment Corp., 24 Misc. 2d 36, 37; In re Morrell, 38 Misc. 2d 518; Dunning v. Dunning, 300 N.Y., 341, 344). There is no genuine issue of material fact discernible to me and the plaintiffs are entitled to summary judgment for the relief demanded in their complaint as a matter of law.

The motions for dismissal, change of venue and intervention are herewith denied and dismissed without the necessity of further formal order. The cross-motion of the plaintiffs for summary judgment is granted. An order and proper judgment to such effect shall be prepared and submitted by the attorneys for the plaintiffs, if consented to by the attorneys for the defendants Overmyer, otherwise to be settled on five days' notice.

It is So Ordered.

/s/ James T. Foley
United States District Judge

Dated: November 20, 1969—Albany, N. Y.

Memorandum-Decision and Order

Since my decision of November 20, 1969, the important part of which granted summary judgment to the plaintiffs, a variety of motions thereafter have been filed in behalf of the Overmyer defendants related to such decision. Positions of Overmyer have resulted in an unusual need for settlement of orders and the judgment. (See Memorandum dated January 23, 1970).

It has happened again, and settlement is now necessary for the proper order that will evidence my decision of January 5, 1970, that simply reaffirmed the denial of a motion by Green & White Construction Co., Inc., a corporation concededly owned by the stockholders of Overmyer, to intervene. It would not seem there should be much difficulty in phrasing an order, agreeable or not, that would conform to this uncomplicated court ruling. Really, the order only needs to state that I again denied the motion to intervene; the reasons being set forth fully in my November 20th decision.

Proposed orders have been submitted. I will sign and return the one submitted in behalf of the plaintiffs and shall return it to the attorneys for the plaintiffs for conformance purposes. It shall be forwarded then to the Clerk of this Court at Utica, New York, for filing. The counter-proposed order submitted by the attorneys for Overmyer and Green & White Construction Co., Inc., is rejected as not in conformance with my decision of January 5, 1970. Rehearing was granted and such grant is contained in the plaintiffs order that is signed. The order of the defendants is unsigned and it and the supporting affidavit will be filed with the Clerk of this Court with this Memorandum-Decision for record purposes. By this ac-

tion it will not be necessary to await the formal settlement date of February 24, 1970, in Albany.

IT IS SO ORDERED.

Dated: February 20, 1970
Albany, New York

JAMES T. FOLEY
United States District Judge

Memorandum of Foley, D. J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Appearances:

Leslie A. Hynes, Attorney for Plaintiffs, William D. Powers, Of Counsel.

Carter & Conboy, Attorneys for Defendants, Overmyer Companies and for Intervenor, Green & White Construction Company, John Cebula, Edward M. Connery, Russell Morton Brown, Brown, Goodpasture & Block, Of Counsel.

Memorandum

JAMES T. FOLEY, D. J.

By decision dated November 20, 1969, four motions were decided in this action. Among them the cross-motion of the plaintiffs for summary judgment permitting mortgage foreclosure was granted. The direction concerning submission of the Order and Judgment of Foreclosure and Sales was to be settled upon notice if not agreed upon.

An Order and Judgment with separate Affidavit of Regularity was submitted by the attorneys for the plaintiffs. A Counter-Order was filed on behalf of the defendants, Overmyer, New York and Ohio. There was only one major

difference in the orders, and after correspondence and discussion it has been resolved.

The Order and Judgment submitted by the plaintiffs is now signed. The major change which I have made is the addition of the words "so sold" after the word "premises" on the fourth line of page 9. Honorable Abraham C. Goldstein, Attorney-at-Law, 5 State Street, Troy, New York, is appointed Referee in the Order with fee to be fixed for his services by this District Court. The plaintiffs, as requested, are awarded an additional allowance of $300.00 with actual costs and disbursements to be later adjudged. The Order and Judgment and Affidavit of Regularity have been marked by me as filed this date at Albany, New York. Such papers are herewith returned to William D. Powers, an attorney for the plaintiffs, for forwarding to W. Arthur Dwyer, Clerk, United States District Court, Federal Post Office Building, Utica, New York 13503.

The Counter-Proposed Order and Judgment submitted by Overmyer is mailed directly to the Clerk for filing and is unsigned.

Order and Judgment of Foreclosure and Sale

Dated: January 23, 1970
Albany, New York

JAMES T. FOLEY
United States District Judge

Motion To Intervene as a Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Green & White Construction Co., Inc. move for leave to intervene as a Plaintiff in this action in order to assert the counter-claim and cross action against the Plaintiff partnership set forth in its proposed Complaint, a copy of which is hereto attached.

In support of this motion, Green & White Construction Co., Inc., set forth that it is a corporation owned by the same stockholders as are the original Defendants, D. H. Overmyer Co., Inc., an Ohio corporation and D. H. Overmyer Co., Inc., a New York corporation; that it has an interest in the transaction which is the subject of this suit as specifically and particularly set forth in the attached proposed Complaint, and it is so situated that disposition of this action without this intervention will, or may as a practical matter, impair or destroy its ability to protect that interest, because the applicant's interest cannot be adequately represented by existing parties.

In further support of this motion, reference is made to Rule 24 of the Federal Rules of Civil Procedure as amended in 1966.

GREEN & WHITE CONSTRUCTION CO., INC.

By: EDMUND M. CONNERY
Edmund M. Connery
General Counsel

RUSSELL MORTON BROWN
Brown, Goodpasture & Block
Federal Bar Building
Washington, D. C.

JOHN CEBULA, ESQ.
Carter & Conboy
74 Chapel Street
Albany, New York

Complaint of Intervenor Green & White Construction Co., Inc., Annexed to Motion

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Intervenor, Green & White Construction Co., Inc., (hereinafter "Green & White"), a Delaware corporation with principal place of business in the City of New York, brings this cross-action and counterclaim to recover damages of approximately $300,000 caused by negligence of plaintiffs, herein called "Woodward-Clyde," failures, omissions, errors, misfeasance and non-performance of professional obligations in connection with the examination and use of a warehouse site at Framingham, Massachusetts.

1. Cross-plaintiff intervenor, Green & White, is a Delaware corporation having its principal place of business at 201 East 42nd Street, New York, N. Y.

2. In April, 1965, Green & White engaged Woodward-Clyde as professional engineers, holding themselves out as experts, to make borings and subsurface studies, and furnish a report on the soil conditions, and suitability for use in construction, of an area on New York Avenue, Framington, Massachusetts, designated by intervenor Green & White as sites Nos. 6 and 7. This area comprised some 14½ acres of land, which said plaintiffs well knew was under consideration for purchase as the location for two concrete warehouse buildings together with appurtenant facilities, loading docks, driveways and railroad sidings.

3. Said plaintiffs well knew that the specific reason for their being engaged was to report as to (1) whether or not the land was geologically suitable for the proposed construction program, and (2) if so, what preliminary site preparation measures would be required before construction could begin. In this connection Green & White

had previously retained said plaintiffs, Woodward-Clyde, to make numerous similar studies and reports in other parts of the country; and said plaintiffs had, in fact, become and were thoroughly familiar with the requirements of the intervenor Green & White.

4. Plaintiffs, Woodward-Clyde, have offices in various cities of the United States, and they hold themselves out as being specially qualified as professional engineers to study, analyze, report and advise on all problems relating to soil mechanics, foundations, and related problems. Intervenor, Green & White, knew of such purported qualifications and holding out by said plaintiffs, Woodward-Clyde, and placed special reliance upon, and confidence in, such representations, all to its damage and detriment as herein set forth.

5. Notwithstanding the personal and professional nature of the engagement undertaken by said plaintiffs, Woodward-Clyde, and the reliance upon them by intervenor Green & White which said plaintiffs well know, yet the said plaintiffs did nothing at all in person to apply their own individual professional knowledge and skills. On the contrary and without prior knowledge, permission or authority from intervenor Green & White, they employed as their agents to make the required study certain persons, Goldberg and Zoino, theretofore wholly unknown to Green & White.

(a) Intervenor Green & White is informed and believes, and so avers, that the plaintiffs, Woodward-Clyde, never did personally examine the Framingham site as they had contracted to do, nor did they independently make any study and analysis of that site, but on the contrary, wholly and completely accepted the report of their agents, said Goldberg and Zoino, without independent study, verification, or evaluation.

(b) Said agents, Goldberg and Zoino, did not actually perform the task required with reasonable care, skill, and professional engineering ability, but on the contrary made a soil study of grossly inadequate character, negligently and recklessly basing so-called expert conclusions upon incomplete and insufficient data.

(c) Said plaintiffs, Woodward-Clyde, received and transmitted to intervenor, Green & White, a site study report and recommendations by their agents, said Goldberg and Zoino, with unlimited approval, showing the site was "geographically suitable" for use as a location for the proposed warehouse buildings, even though such conclusion was untrue and misleading in the absence of expenditure of several hundred thousand dollars to make it suitable by removal of great quantities of wet subsoil, swampy vegetation, water-retaining peat in large areas, and replacement of such material with dry sandy fill imported from other locations; in addition expensive and extensive blasting by dynamite operations were necessary to remove underground rock in part of the site.

6. Relying upon said unconditional report, and the submission thereof by the plaintiffs Woodward-Clyde, intervenor Green & White entered into a firm contract for the construction of two warehouse buildings on the site in question at a fixed price, including therein the sum of $30,000, which was reasonably calculated to provide for preparation of the site under the conditions outlined in the aforesaid soil report.

7. Notwithstanding said allowance, conditions were found which were wholly and completely different from those indicated in said report so submitted by plaintiffs, and intervenor Green & White has been required to ex-

pend sums exceeding $300,000 in utilizing the site for construction purposes.

8. Without authority, said Goldberg and Zoino, plaintiff's agents sent to the construction site employees who were not qualified by education or experience to take action in the program, and said employees were not given proper instructions as to their duties or responsibilities, but they arbitrarily and recklessly undertook to give directions to subcontractors, grossly and wantonly interfering with the proper management of the work.

(a) They caused very great movements of soil and dynamiting of rock far beyond what was necessary or required in the construction program.

(b) They directed filling of great areas with material purchased and brought from other locations even though adequate fill material was available without cost on the site.

(c) They caused the placing of fill material over unstable peat deposits, which intervenor Green & White has had to remove in order to utilize the site properly.

9. All of said operations were conducted negligently, without reasonable professional skill, investigation, planning, supervision, or thought on the part of Woodward-Clyde.

10. Plaintiffs, Woodward-Clyde, did not in any way give proper professional supervision or attention to the responsibilities they undertook; but wholly and completedly delegated them without notifying the intervenor Green & White, and made no personal inspection of the site as required by reasonable professional engineering practices and standards, as well as by their contract, but utterly failed to carry out a reasonable standard of care in the exercise of professional engineering practice.

11. The same averments are true as to the agents, Goldberg and Zoino, but who were not only professionally negligent, but who also actively intruded upon the construction program with affirmative action of a harmful and wrongful nature which greatly increased the expenses of construction.

12. All the said plaintiffs unlawfully, wrongfully, negligently and unprofessionally delegated their responsibilities to other persons who were not professionally qualified, to the very great damage of this intervenor and cross-plaintiff, Green & White.

13. Being unable to pay or finance payment of the very great losses caused by said professional negligence, this intervenor and cross-plaintiff, Green & White, was forced to call upon its affiliate, D. H. Overmyer Co., Inc., an Ohio corporation for support, and this call was answered by causing the defendant, D. H. Overmyer Co., Inc., a New York corporation, to execute and deliver to plaintiffs the mortgage upon which they now sue. Said excess costs and losses in said construction program caused this intervenor, Green & White, to exceed by far the contract cost of said Framingham warehouse buildings and this intervenor is and will be obligated to repay to D. H. Overmyer Co., Inc., of New York, and its affiliates, if this Court should render judgment in favor of plaintiffs herein.

Wherefore the intervenor and cross-plaintiff, Green & White, prays for judgment against plaintiffs jointly and severally in the sum of $300,000 as compensation for the excess costs which this intervenor and cross-plaintiff Green & White had to pay, and became obligated to pay, for construction of the said warehouse buildings due to the negligence, inattention, omissions, wrongful interference and other misconduct of plaintiffs and their agents, together with the costs of suit.

14. Plaintiffs, Woodward-Clyde, in the month of May 1967 were asserting a very large claim for professional services (including therein a claim for services with ref-

erence to the above-described site) against the business affiliates of the defendants D. H. Overmyer Co., Inc. Said claim had at one time exceeded $243,000. and had been reduced to approximately $183,000.

15. In order to secure payment to said plaintiffs and believing that the said claim was due and owing for professional services actually performed in good faith and with reasonable professional care and skill, the defendant D. H. Overmyer Co., Inc., a New York corporation, executed a mortgage upon certain real estate in the Town of Colonie, County of Albany, in the State of New York, containing some 6.776 acres with a valuable warehouse thereon, having an appraised value of approximately $1,000,000 and covered by a prior first mortgage originally in the amount of $700,000, held by the Marine Midland National Bank of Troy, New York. The mortgage given the said plaintiffs is dated May 23, 1967, and recorded in the public records of said County and State.

16. Since the original date of said mortgage, the defendant mortgagor, D. H. Overmyer Co., Inc., has paid the sum of $60,000 plus interest in monthly payments on the 20th of each month; and the plaintiffs, Woodward-Clyde, claim that there is still due and owing on account of said mortgage the sum of $123,654.35 with interest accruing at the rate of 6% per annum.

17. Because of the alleged failures, defaults, omissions and professional negligence of said plaintiffs Woodward-Clyde and their agents, Goldberg and Zoino, and sub-agents as set forth above, which were wholly unknown to this intervening cross-plaintiff, said mortgage was given by defendant, D. H. Overmyer Co., Inc., to the plaintiffs, Woodward-Clyde, to secure a debt which was not in good faith and conscience due and payable, but on the contrary there had been a material failure of consideration for the note upon which this suit is bottomed and the mortgage given to secure it. Plaintiffs at all times represented and insisted that all of their work

had been properly performed with all requisite professional care and skill, and this intervenor reasonably and in good faith believed that to be true, notwithstanding that said plaintiffs well knew, and in the exercise of reasonable care should have known, that the Framingham site in Massachusetts was not properly surveyed or analyzed and had been falsely and negligently reported to this intervening cross-plaintiff as suitable for construction.

Wherefore, this intervening cross-plaintiff prays the Court to hear and decide the issues in accord with law, and render judgment in favor of Green & White, intervenor, against plaintiffs in the sum of $300,000 and for interest and costs of suit, and such other and further relief as may be warranted.

DEMAND FOR JURY TRIAL

Intervening cross-plaintiff, Green & White Construction Co., Inc., demands trial by jury of all issues of fact in this case.

GREEN & WHITE CONSTRUCTION CO., INC.

By .....
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 800, 801 and 802—September Term, 1969.

(Argued May 11, 1970 Decided June 9, 1970.)

Docket Numbers 34606, 34748 and 34749

RICHARD J. WOODWARD, NED P. CLYDE, JAMES L. SHERARD, RAYMOND LUNDGREN, DOUGLAS C. MOORHOUSE, and DAVID M. GREER, doing business as Woodward-Clyde-Sherard & Associates, a partnership,

Plaintiffs-Appellees,

—against—

D. H. OVERMYER CO., INC., a New York corporation,
D. H. OVERMYER CO., INC., an Ohio Corporation,

Defendants-Appellants.

Before:

FRIENDLY and KAUFMAN, *Circuit Judges* and BRYAN, *District Judge.**

Opinion

Appeals from a summary judgment entered by the District Court for the Northern District of New York, James T. Foley, Chief Judge, in favor of plaintiffs in a mortgage foreclosure action. Affirmed.

JAMES H. REIDY, Esq. (Gerard L. Goettel, New Work, New York, of Counsel), *for Defendants-Appellants.*

WILLIAM D. POWERS, Esq. (Leslie A. Hynes, New York, New York, of Counsel), *for Plaintiffs-Appellee.*

FRIENDLY, *Circuit Judge:*

This action by six partners of Woodward-Clyde-Sherard & Associates (sometimes hereafter "the Woodward part-

* Of the Southern District of New York, sitting by designation.

ners") to foreclose a second mortgage on property in Albany County, N. Y., executed by D. H. Overmyer Co., Inc., a New York corporation (Overmyer N. Y.), in order to secure notes signed by D. H. Overmyer Co., Inc., an Ohio corporation (Overmyer Ohio), and for a deficiency judgment, has given rise to a number of procedural problems.

The most important is whether the action is properly in federal court at all. The complaint was filed in the Supreme Court of New York for Albany County, and Overmyer Ohio and Overmyer New York petitioned for removal. The petition alleged that "none of the individual parties plaintiff is a citizen of the State of New York or the State of Ohio but are all citizens of the State of California or of the State of New Jersey"; that Overmyer Ohio is an Ohio corporation with its principal place of business in New York; and that Overmyer New York is a New York corporation with its principal place of business in that state. The petition was bad under the second sentence of 28 U.S.C. § 1441(b), providing that an action not found on the existence of a federal question "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." While the action should therefore have been remanded if the plaintiffs had moved for such relief,[1] no suggestion on this score was made until the Overmyer corporations brought the point to our attention. Nevertheless under the "strong" rule that federal jurisdiction may be challenged at any stage, even by the party who invoked it, see Wright, Federal Courts § 7 (1970)[2] we must consider the problem.

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[1] Since, under 28 U.S.C. § 1331(c), Overmyer Ohio is deemed a citizen of New York for the purpose of § 1441, there would have been no possibility of justifying the removal under § 1441(c).

[2] The quoted adjective comes, of course, from Chief Justice Erle's famous characterization, quoted in Pound, Mechanical Jurisprudence, 8 Colum. L. Rev. 605, 608 (1908), and III Pound, Juris-

The severity of this rule stimulated judicial ingenuity to avoid it with respect to the issue with which we are here concerned. In *Handley-Mack Co.* v. *Godchaux Sugar Co.*, 2 F.2d 435 (6 Cir. 1924), Judge Knappen drew a distinction between § 2 of the Act of March 3, 1875, 18 Stat. 470, authorizing removal, *inter alia*, of actions "in which there shall be a controversy between citizens of different States," which he deemed to be jurisdictional in the true sense, and the provision limiting removal in diversity cases to a defendant not a resident of the state where the action was brought. Drawing on *Baggs* v. *Martin*, 179 U.S. 206 (1900), he held that where only the latter provision was violated and the plaintiff made no timely request for remand, the situation could be considered to be as if the plaintiff had brought the action in the federal court and, if jurisdiction would have existed in that event, objection on the score of non-removability would be deemed waived. Although the historical argument was rather shaky,[3] the result was desirable and Judge L. Hand, writing also for Judge Swan

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prudence 511 (1959). Conformably with Pound's prediction that such rules ultimately lead to curative action, the American Law Institute has proposed legislation to limit this harsh doctrine. Study of the Division of Jurisdiction between State and Federal Courts § 1386.

[3] The 1875 statute allowed removal without restriction, at the instance of either plaintiff or defendant. But these sweeping provisions were soon superseded by the Act of March 3, 1887, 24 Stat. 552, as corrected by the Act of August 13, 1888, 25 Stat. 433, both of which limited removal to defendants. Section 2 of the 1888 statute broke removal into two categories. Actions presenting a federal question might be removed only "by the defendant or defendants therein, being non-residents of that State," subject to a provision with respect to separable controversies. This was carried forward in § 28 of the Judicial Code of 1911, 36 Stat. 1094. In other words, from 1888 until 1948 the provision limiting removal for diversity to a non-resident defendant was in the same sentence authorizing removal itself, and a rather sharp scalpel was needed to dissect out one part of the sentence as jurisdictional leave the other as not.

and Judge A. N. Hand, found Judge Knappen's opinion "conclusive." *Bailey* v. *Texas Co.*, 47 F.2d 153, 155 (2 Cir. 1931). We are quite content to follow our distinguished predecessors, especially since the two cases were cited in *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 16-17, n. 14 (1951), with what could be regarded as approval and certainly was not disapproval.

Not seriously disputing this, appellants question whether there would have been jurisdiction had the action been originally brought in a federal court. The only doubt arises from the fact that the Woodward partnership has its principal office in New York and is alleged to have been organized under New York law, whatever that may mean. Although New York permits partners to sue or be sued in the partnership name, CPLR § 1025, this does not alter the long-standing rule that, for purposes of diversity jurisdiction, the court looks to the citizenship of the partners, *Great Southern Fireproof Hotel Co.* v. *Jones*, 177 U.S. 449, 456 (1900); *A. D. S. Developers, Inc.* v. *Tucker*, 263 F. Supp. 986 (E.D. Pa. 1967); contrast *Colonial Realty Corp.* v. *Bache & Co.*, 358 F.2d 178, 183-84 (2 Cir. 1966), dealing with a limited partner. We thus uphold federal jurisdiction and must now recount the proceedings below.

Immediately upon the action being removed, defendants, on January 2, 1968, filed a motion to dismiss the complaint. This was based on a contention concerning improper presentment of the allegedly defaulted note of Overmyer Ohio, a contention so utterly trivial and unmeritorious as not to warrant statement here. Three weeks later they filed a motion for a change of venue to the District of Massachusetts. This motion, almost certainly ill-founded in a mortgage foreclosure action, see 1 Moore, Federal Practice ¶ 0.142 [2.-1] and cases there cited in n. 16, alleged that the notes in suit had been given for plaintiffs' performance of engineering services in many states; that after delivery of the notes and payment of some, defendants learned that

plaintiffs had "unwarrantably and negligently" delegated their duties to others; and that as a result defendants' affiliate, Green & White Construction Company, Inc., on whose behalf the notes had been given by Overmyer Ohio, had instituted an action to recover damages in the District of Massachusetts in which Overmyer New York had joined to seek an injunction against the mortgage foreclosure.

After submitting affidavits in opposition to both motions, plaintiffs, in June 1968, cross-moved for summary judgment. The moving affidavit recited that the Massachusetts action, brought by Green & White and Overmyer New York against Goldberg-Zoino & Associates, Inc., a Massachusetts corporation, and two of the Woodward partners, had been dismissed with respect to the latter on jurisdictional grounds. A supplemental affidavit later apprised the court that the judge in Massachusetts had allowed Green & White but not Overmyer New York to file an amended complaint naming all the Woodward partners. In October 1968 defendants responded with an affidavit of their general counsel again raising the presentment issue and mentioning the claim of professional misconduct in a conclusory fashion, as hereafter noted. At the same time Green & White moved for leave to intervene as a plaintiff; its proposed complaint asserted the same claim against the Woodward partners it had alleged in Massachusetts. All four motions were argued in November. A year later, on November 20, 1969, the court denied defendants' motions to dismiss the complaint and for change of venue and Green & White's motion to intervene, and granted plaintiffs' motion for summary judgment. The portion of the opinion relating to the last discussed only the argument about presentment and said nothing about the claim of professional negligence. The judge directed plaintiffs' attorneys to prepare an order which, unless consented to, should be settled on notice.

Defendants responded with a renewed motion, served December 18, 1969, this time made by them as well as by

Green & White, to allow the latter to intervene as a plaintiff in order to assert its claim against the plaintiffs and in the meanwhile to stay the summary judgment. Circumstances were alleged to have changed because of the discontinuance of the Massachusetts action due to inability to serve all the Woodward partners. In one of the moving affidavits, by the general counsel of the Overmyer corporations, we find the first inkling that this claim, still alleged to be vested in Green & White, and somehow passed to Overmyer Ohio. The affidavit asserted that in February, 1968, some eight months before the initial Green & White motion to intervene as a plaintiff, Overmyer Ohio had assumed all its liabilities "and in consideration therefor became entitled to all the claims and accounts receivable of said Green & White, liquidated and unliquidated"; that "in order to make said transfer effective" Green & White and Overmyer Ohio adopted resolutions transferring the claim against the Woodward partners to the latter;[4] and that "it is the purpose of this assignment to express the true ownership of this claim, and make possible its satisfaction by decision of this Court which has jurisdiction of the W-C-S partnership." Plaintiffs filed opposing papers and the judge denied the motion on January 5, 1970.

Somewhere along the line plaintiffs submitted an order of foreclosure and sale in the usual form. On January 14, 1970, defendants served a counter-proposed order with only a minor modification. The judge signed the plaintiffs' order on January 23.

The final chapter was a motion by the defendants and Green & White dated February 12, 1970, for a rehearing with respect to their renewed motion. This asked the judge to sign a new order that would allow the Overmyer defendants to file answers to the complaints containing counter-

[4] The affidavit did not give the dates of the resolutions or attach copies.

claims within ten days, and to apply for a stay of the judgment of foreclosure and sale within another ten. Instead the judge signed an order by which he simply granted rehearing and adhered to his previous decision. With that this tedious recital ends.

The case illustrates a difficulty that may arise when a defendant, as required by F.R. Civ. P. 12(b), moves under that rule before answer and plaintiff counters with a motion for summary judgment. The Overmyer corporations argue that entry of summary judgment against them deprived them of the right, conferred by F.R. Civ. P. 12(a), whereby if the court denies a 12(b) motion or postpones its disposition until a trial on the merits, the defendant may file a responsive pleading within ten days. They contend that if the judge had denied their motions promptly instead of holding them for disposition with the plaintiffs' summary judgment motion, they could have filed an answer containing the counterclaim for professional malpractice and should be allowed to do so even at this late stage.

We can conceive of a situation, e.g., where a defendant acquired a counterclaim after submission of a plaintiff's summary judgment motion, where a contention of this sort might have merit. But this is not such a case. Before defendants had even made their motion to dismiss they were aware of the claim of defective service rendered to Green & White. When plaintiffs moved for summary judgment, it was open to the Overmyer corporations to raise against this the point that because of plaintiffs' misconduct the consideration for the notes had failed, quite apart from any ruling the court might make on Green & White's motion to intervene for the purpose of seeking a recovery. Yet the only paper they submitted in answer to plaintiffs' motion was a short affidavit by their general counsel which, after attempting to deal with the presentment issue, set forth in a conclusory manner that it had been "officially brought" to his attention that the work for which the notes

had been given "was negligently, carelessly, unprofessionally, unskillfully performed and unlawfully delegated without authority or permission by said partnership to other persons unknown to Green & White Construction Company, Inc., for whom said engineering work was to be done."[5] This was so far from meeting the requirements of F.R. Civ. P. 56(e) that discussion or citation of authority would be supererogatory. Moreover the judge had every reason to suppose that on this issue the defendants were placing primary reliance on the claim which their affiliate, Green & White, sought to assert by its motion for leave to intervene,[6] although, as defendants now contend, Green & White had transferred the claim to Overmyer Ohio in February so that the affidavit in response to the summary judgment motion could also have brought Overmyer's potential counterclaim to the court's attention. Perhaps, despite all this, the judge might have allowed defendants to plead a counterclaim if they had done this within 10 days of his denial of their motion to dismiss on November 31, 1969. Instead they waited until December 18 to make a motion, returnable January 5, 1970, which was primarily a renewal of the intervention motion although, as stated, one of the moving affidavits intimated that Overmyer Ohio had been the real owner of the claim all along. Not until February 12, 1970, nearly three months after the denial of their Rule 12(b) motion, did defendants clearly indicate a desire to plead a counterclaim.

Defendants complain that they have never had a day in court on their claim of professional malpractice and that the statute of limitations may now bar them from having one. While this sort of contention inevitably strikes a responsive chord in the judicial ear, if ever there were a

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[5] A following paragraph was to the same effect.

[6] This motion was clearly for permissive intervention under F.R. Civ. P. 24(b) and denial was not an abuse of discretion.

case where a litigant's plight was of his own making, this is it. Bearing in mind the long delay to which plaintiffs have already been put, we think it clear that the interests of justice require affirmance of the judgment.

It is so ordered.

Rule 13—Rules of Civil Procedure

COUNTERCLAIM AND CROSS-CLAIM

(a) *Compulsory Counterclaims.* A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

McKinney's Consolidated Laws of New York.

Uniform Commercial Code

§ 3—306. *Rights of One Not Holder in Due Course*

Unless he has the rights of a holder in due course any person takes the instrument subject to

(a) all valid claims to it on the part of any person; and

(b) all defenses of any party which would be available in an action on a simple contract; and

(c) the defenses of want or failure of consideration, non-performance of any condition precedent, non-de-

livery, or delivery for a special purpose (Section 3—408); and

(d) the defense that he or a person through whom he holds the instrument acquired it by theft, or that payment or satisfaction to such holder would be inconsistent with the terms of a restrictive indorsement. The claim of any third person to the instrument is not otherwise available as a defense to any party liable thereon unless the third person himself defends the action for such party. L.1962, c. 553, eff. Sept. 27, 1964.

§ 3-408. *Consideration*

Want or failure of consideration is a defense as against any person not having the rights of a holder in due course (Section 3—305), except that no consideration is necessary for an instrument or obligation thereon given in payment of or as security for an antecedent obligation of any kind. Nothing in this section shall be taken to displace any statute outside this Act under which a promise is enforceable notwithstanding lack or failure of consideration. Partial failure of consideration is a defense pro tanto whether or not the failure is in an ascertained or liquidated amount. L.1962, c. 553, eff. Sept. 27, 1964.

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IN THE

Supreme Court of the United States

October Term, 1970

No. 818

D. H. OVERMYER CO., INC., a New York corporation, D. H. OVERMYER CO., INC., an Ohio corporation, GREEN & WHITE CONSTRUCTION CO., INC., a Delaware corporation

and

THE SEAMAN'S BANK FOR SAVINGS IN THE CITY OF NEW YORK, QUICKWAY EXCAVATORS, INC., NUCLEAR CORPORATION OF AMERICA, M. KRAMER & SONS, INC., THE PEOPLE OF THE STATE OF NEW YORK, and THE STATE TAX COMMISSION,

Petitioners,

against

RICHARD J. WOODWARD, NED P. CLYDE, JAMES L. SHERARD, RAYMOND LUNDGREN, DOUGLAS C. MOORHOUSE, and DAVID M. GREER, doing business as Woodward-Clyde-Sherard & Associates, a partnership,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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WILLIAM D. POWERS,
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TABLE OF CONTENTS

	PAGE
Questions Presented	1
Statement of the Case	2
Reasons for Denying the Writ	3
Argument	12
I. The Court below properly denied the motion of Green & White to intervene as of right in the within action	12
II. The motion of Green & White to intervene and the proposed intervenor complaint of Green & White could not be considered in opposition to the cross-motion for summary judgment	16
Conclusion	18
APPENDIX:	
Complaint—New York State Supreme Court	RA1
Exhibit A—Letter Dated February 21, 1967	RA8
Exhibit B—Second Mortgage	RA11
Affidavit of James H. Reidy in Support of Proposed Order on Motion for Rehearing of Motion to Intervene	RA17
Complaint—United States District Court	RA23

AUTHORITIES CITED

CASES:

Carey, Baxter & Kennedy, Inc. v. Wilshire Oil Company of Texas, 346 F. 2d 110 (10th Cir. 1965)	15
Cresta Blanca Wine Co., Inc. v. Eastern Wine Corporation, 143 F. 2d 1012 (2 Cir. 1944)	16

PAGE

Farmland Irrigation Co. v. Dopplmaier, 220 F. 2d 247 (9 Cir. 1955) 12, 14

Isbrandtsen Co. v. S. S. Kokoh Maru, 263 F. Supp. 784 (U. S. D. C. S. D. N. Y. 1966) 16

Kauffman v. Kebert, 16 F. R. D. 225, aff'd 219 F. 2d 113 (3 Cir. 1955) 15

S. C. Johnson & Son, Inc. v. Boe, 187 F. Supp. 517 (U. S. D. C. E. D. Pa. 1960) 13, 16

Stadin v. Union Electric Company, et al., 309 F. 2d 912 (8th Cir. 1962) 13

STATUTES:

Section 310 of the Civil Practice Law and Rules of the State of New York 9

Chapter 227 of the General Laws of Massachusetts, Section 5 9

Federal Rules of Civil Procedure:

Rule 24(a) 12, 15

Rule 24(b) 15

Rule 56(e) 16

MISCELLANEOUS:

Moore on Federal Practice, Vol. 4, par. 24.17 p. 126 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

D. H. OVERMYER CO., INC., a New York corporation, D. H. OVERMYER CO., INC., an Ohio corporation, GREEN & WHITE CONSTRUCTION CO., INC., a Delaware corporation

and

THE SEAMAN'S BANK FOR SAVINGS IN THE CITY OF NEW YORK, QUICKWAY EXCAVATORS, INC., NUCLEAR CORPORATION OF AMERICA, M. KRAMER & SONS, INC., THE PEOPLE OF THE STATE OF NEW YORK, and THE STATE TAX COMMISSION,

Petitioners,

against

RICHARD J. WOODWARD, NED P. CLYDE, JAMES L. SHERARD, RAYMOND LUNDGREN, DOUGLAS C. MOORHOUSE, and DAVID M. GREER, doing business as Woodward-Clyde-Sherard & Associates, a partnership,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Questions Presented

Can a third party intervene in an action as of right and as a party plaintiff for the sole purpose of alleging a claim against the plaintiff therein?

Can a proposed unverified intervenor complaint be considered in opposition to a motion for summary judgment?

Statement of the Case

The real issue before this Court is whether petitioner Green & White Construction Co., Inc. (hereinafter referred to as "Green & White") has been denied the right to assert an alleged claim against the respondents in the Courts below. The facts presented to the Courts below, and as they actually exist, are that Green & White attempted to intervene in the action to assert a non-meritorious claim against the respondents and that it was not until that attempt failed that petitioners D. H. Overmyer Co., Inc., a New York corporaion, and D. H. Overmyer Co., Inc., an Ohio corporation (hereinafter jointly referred to as the "Overmyer corporations"), then, for the first time, contended that the alleged claim of Green & White had been assigned to one of them on a date prior to the time that it had been asserted by Green & White in the within ection, and that the alleged claim was, in fact, that of the Overmyer corporations. Based on the papers submitted by the petitioners in this Court, it is difficult to determine to whom they claim the alleged cause of action belongs. Their use of the word "counterclaim" indicates that they now contend the alleged claim belongs to the Overmyer corporations. However, their use of this word may be an attempt to have this Court believe that their efforts to assert a counterclaim in the Courts below were denied when in fact the claim sought to be interposed was by way of intervention by Green & White, an affiliate corporation, who was not a party to the action.

In their attempt to convince this Court that they have been denied the right to assert their alleged claim, the Overmyer corporations have failed to recite all of the facts and have thereby distorted them. In addition, the actions and counteractions taken by the Overmyer corporations during the course of these proceedings make it evident their sole purpose and objective is to delay payment of a sum justly due and owing to the respondents.

Reasons for Denying the Writ

Facts

Respondents commenced this action on or about December 13, 1967 in the Supreme Court of the State of New York, County of Albany. The action was removed to the United States District Court for the Northern District of New York by the Overmyer corporations on or about December 30, 1967 (App. 3a).

By their complaint the respondents alleged that on February 21, 1967, petitioner Overmyer-Ohio entered into a written agreement whereby that petitioner agreed to issue thirteen promissory notes totalling $243,654.35, with interest at the rate of six percent per annum to settle an existing debt owed to the respondents (App. 3a).* Both the agreement and the notes provided that in the event of non-payment of any one of the notes for a period of sixty days all or any part of the remaining unpaid notes would become due and payable at the option of the holder of the notes.

The complaint further alleged that on May 23, 1967 Overmyer-New York made, executed and delivered to the respondents a certain second mortgage as collateral security for payment of $183,654.35, which was the principal amount of the serial notes then remaining unpaid, and that the mortgage, which was recorded in the office of the Clerk of the County of Albany on June 6, 1967, was on a certain described premises located in the County of Albany (App. 3a).

The complaint also alleged that Overmyer-Ohio was presented with the note due on September 20, 1967, but that payment was refused, and that by reason of this

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* References to the Appendix of the petitioners are designated by the prefix "App.". References to the Appendix of the respondents are designated by the prefix "RA".

refusal the then balance of $123,654.35 was due and owing (App. 3a).

By reason of the allegations of the complaint, the respondents sought foreclosure of the second mortgage furnished to them by Overmyer-New York (App. 21a-22a).

In lieu of answering the complaint, the Overmyer corporations moved to dismiss it. The basis for seeking the requested relief was the contention of the Overmyer corporations that (a) the defaulted note was not presented at the place designated in the note, and (b) the payee had not endorsed the note and therefore neither the Chemical Bank New York Trust Company branch located at 277 Park Avenue, New York, New York, the substituted place of payment by agreement of the parties, nor its notary was in any way authorized to demand or receive payment (App. 5a).

The Trial Court denied this motion and on the appeal the Court found the contention to be "so utterly trivial and unmeritorious as not to warrant statement" (App. 24a).

By notice of motion dated January 23, 1968, the Overmyer corporations moved to change the venue of the within action to the United States District Court for the District of Massachusetts. In support of that motion, the Overmyer corporations contended, in effect, that there had been a failure of consideration for the notes and the second mortgage furnished to the respondents in that the respondents negligently delegated to others the engineering services that they had agreed to perform on a Massachusetts project and that the persons to whom the work had been delegated did not perform the work in a proper, careful and skillful manner. The Overmyer corporations also contended that as a result of this alleged unprofessional and negligent misconduct by the respondents and

their agents, Green & White commenced an action in the United States District Court for the District of Massachusetts to recover damages in which action Overmyer-New York had joined to seek an injunction against the mortgage foreclosure (App. 24a-25a).

The respondents opposed the change of venue motion of the Overmyer corporations noting that under both New York and federal practice the within action which is to foreclose a mortgage, is a local action which must be brought in the county where the property is located, i.e., the County of Albany (App. 5a-6a).

The respondents also noted that the claim alleged in the complaint in the District of Massachusetts action and referred to above was by Green & White and that the only relief sought by Overmyer-New York in that action was to enjoin certain of the respondents herein from prosecuting the within action.

By notice of Cross-Motion dated June 10, 1968, the respondents moved for summary judgment. In support of that motion the respondents noted that they are professional engineers who rendered professional services to Green & White in connection with numerous construction projects throughout the country for which they had not received payment and that in approximately January, 1967 the amount owed to them by Green & White was $243,543.35. Negotiations between counsel for the respondents and counsel for the Overmyer corporations resulted in settlement of the debt, which settlement was confirmed by letter agreement dated February 21, 1967. By that agreement Overmyer-Ohio agreed to issue thirteen serial notes totalling the full amount owed. All of the notes contained an acceleration provision which, at the option of the respondents, made all unpaid notes due and payable within sixty days from default in payment of any one of the notes on its due date (RA8-10).

The letter agreement also provided that as security for the debt respondents would be furnished with a second mortgage on real estate to the full extent of the debt and that the only lien against the real estate would be a first mortgage (RA9).

On May 23, 1967, pursuant to the terms of the letter agreement, the respondents received a second mortgage, which is the subject matter of this litigation (RA11-16).

In support of their motion for summary judgment, the respondents also indicated that in approximately March, 1968, the respondents herein who were named as defendants in the Massachusetts action moved to dismiss the Massachusetts complaint claiming (a) insufficiency of process; (b) failure to join parties; and (c) failure to state a claim. On April 8, 1968, the Massachusetts Court granted the motion on two separate grounds. It held that the respondents herein who were named and served as defendants in that action did not constitute the entire partnership and therefore could not be sued as a partnership. The Court also held that the cause of action alleged by Overmyer-New York did not state a claim against the respondent partnership (App. 7a, 25a).

On or about May 3, 1968, both Green & White and Overmyer-New York moved in the Massachusetts action to amend their complaint to add all of the members of the respondent partnership as defendants. The Court, by order entered on June 15, 1968, granted the motion to amend as to Green & White, but denied the motion as to Overmyer-New York stating that its claim had been dismissed by the prior order of April 8, 1968, referred to above (App. 7a, 25a).

Thus, as of June 15, 1968, Green & White had an action pending against the respondents herein in the District of Massachusetts. However, the Overmyer corporations ob-

viously felt that the existence of the Massachusetts action would not assist them in their attempts to avoid the mortgage foreclosure and they subsequently had the Massachusetts action voluntarily discontinued (App. 26a).

In opposing the cross-motion for summary judgment, the Overmyer corporations through their secretary and general counsel presented two arguments, the first of which was that the secretary and general counsel of those corporations, who had agreed to change the place of payment of the underlying notes did so without corporate authority. The second argument amounted to nothing more than a brief recital of the facts alleged in the complaint in the Massachusetts action, i.e. that the respondents did not participate in or supervise the work on the Massachusetts project but left it to be performed by others who performed in a negligent and careless manner (App. 25a).

After the respondents cross-moved for summary judgment, Green & White moved to intervene as a plaintiff in the within action. Its proposed complaint asserted the same claim against the respondents herein as it had alleged in the Massachusetts action (App. 25a). In that notice of motion Green & White stated that its interests could not be adequately represented by the existing parties and that by reason thereof disposition of the action without its intervention will or might destroy its ability to protect its interests (App. 13a). Other than its notice of motion, the only other paper submitted in support of the motion was the proposed complaint which was almost identical to the complaint in the Massachusetts action.

It should be noted that the Overmyer corporations and Green & White, the applicant for intervention, were separate and distinct corporate entities and, despite the fact that they might be related, a possible unrelated cause

of action in favor of one cannot be used to defeat the rights of the respondents. In seeking to intervene, Green & White was apparently under the impression that an alleged cause of action of Green & White in some manner inured to the benefit of the Overmyer corporations.

The lack of relationship between the alleged claim of Green & White and the claim of the Overmyer corporations was admitted in the intervention papers of Green & White in that the basis for seeking intervention was that its "interest cannot be adequately represented by existing parties" (App. 13a). If there was any relationship between the two claims the interests of Green & White would obviously be protected in that the attorneys representing the Overmyer corporations were absolutely identical to the attorneys who made the motion to intervene on behalf of Green & White. Under these circumstances Green & White did not qualify to intervene as a matter of right and it also failed to qualify for intervention by permission.

In addition to filing a notice of appeal from the order of the Court below dated and filed on November 20, 1969, the proposed intervenor, Green & White, made a motion for a rehearing of its motion to intervene (App. 25a-26a). In support of that motion Green & White contended that it had voluntarily discontinued the action that it had pending in Massachusetts against the respondents, and that one of the reasons for discontinuing the action was that it was impossible to serve all of the respondents in Massachusetts as they were a partnership and by law all of them were necessary parties to the action and each had to be served (App. 26a). In support of that motion Green & White also reiterated in summary fashion the allegations set forth in the proposed complaint.

The moving papers submitted by Green & White on that motion are, on their face, pure sham and without

merit, either in fact or in law. There is absolutely no principle of law that requires all members of a partnership to be served before a court can obtain jurisdiction over the partnership. Section 310 of the Civil Practice Law and Rules of the State of New York provides that service on one of the partners gives personal jurisdiction over the partnership. In addition, Chapter 227 of the General Laws of Massachusetts, Section 5, which is one of the several sections dealing with jurisdiction over partnerships, provides that foreign partnerships are deemed to have appointed the Secretary of State as their agent for service if the partnership fails to appoint an agent.

In addition, the Courts below were totally familiar with the pleadings and proceedings that transpired in the Massachusetts action on the original motion of Green & White to intervene. Obviously, what petitioners herein were attempting to accomplish was to confuse the issues and jump back and forth from one court to another, depending on which best served their purposes. If Green & White was sincere in its efforts to pursue its alleged claim against the respondents, it would have effected service upon the partnership and continued with the prosecution of the Massachusetts action.

As noted, *supra*, the order of the Massachusetts Court permitting Green & White to amend its complaint to include all of the respondents was entered on June 15, 1968. The motion which Green & White sought renewal of was not decided by the Court below until November 20, 1969, approximately one and one-half years later. Clearly, Green & White knew what course of action it intended to pursue prior to the order of November 20, 1969. Yet, nothing was done to advise the Court below of this decision. The obvious reason for this failure to act by Green & White was to first determine what action the Court below would take on its motion to intervene and then take the position which best suited its purposes.

After hearing argument on the motion by Green & White for a rehearing of its motion to intervene, the Court below granted the motion for a rehearing but, upon rehearing, adhered to its original decision as expressed in its Memorandum-Decision and Order dated and filed on November 20, 1969 (App. 10a). The Court also directed that an order be settled in accordance with its decision. The attorney representing Green & White agreed to prepare the proposed order and, in complete disregard of the direction of the Court below, served and filed a proposed order which provided for service and filing of an answer containing counterclaims by the Overmyer corporations within ten days from the filing of the order.

In support of the proposed order the Overmyer corporations submitted an affidavit, the thrust of which was that in or about February, 1968, Overmyer-Ohio assumed the liabilities of Green & White and thereby became entitled to the receivables and other claims of Green & White (App. 26a). The stated reason for not making this contention known until after the submission of numerous affidavits and other documents flatly stating that the claim against the respondents was one that belonged to Green & White, was that ". . . it was decided to leave the claim against W-C-S [the respondents] in the name of Green & White because the motions made by Overmyer relieved it of the necessity of serving an answer to the complaint which would then have had to include all known counterclaims" (RA20). Thus, the petitioners herein were asserting, in effect, that they could vacillate back and forth with respect to the true party in interest and completely disregard the facts as they actually existed.

It would seem apparent that the position taken by the petitioners herein on the settlement of the order in question was purely and simply an afterthought and just another attempt by them to delay payment to the respond-

ents. This assumption is supported by the fact that the petitioners made absolutely no effort to produce a copy of the alleged resolution by which Overmyer-Ohio assumed the liabilities of Green & White and allegedly thereby became entitled to its receivables and claims.

In the affidavit submitted in support of the proposed order, the petitioners herein also lamented the fact that the Court below decided all of the motions pending before it at the same time (RA20). To the contrary, it would be strange and indeed unusual for a court to follow any other procedure. There was absolutely no reason for the Court below to decide these motions separately and, as a matter of fact, it was to the advantage of the Overmyer corporations for the Court to decide all of the motions at one time as they had failed to present one shred of evidence to defeat the motion of the respondents for summary judgment, other than the belated and concocted claim of Green & White to intervene.

It should also be noted that since the entry of the orders in the Courts below, Overmyer-Ohio, individually and as alleged assignee of Green & White and others, commenced an action in the Supreme Court of the State of New York, County of New York, against the respondents herein. One of the causes of action set forth in the complaint (first cause of action) seeks to recover damages for the same alleged acts of the respondents herein as were alleged in the proposed intervenor complaint of Green & White (RA23-25). Clearly, by the commencement of that action, petitioners herein have demonstrated that there was no basis to the proposed intervenor complaint that Green & White sought to allege in the within action. By its complaint in the New York action, Overmyer-Ohio is apparently now taking the position that the alleged claim belonged to it and not to Green & White, and has impliedly admitted that the Courts below properly denied the motion of Green & White to intervene.

ARGUMENT

POINT I

The Court below properly denied the motion of Green & White to intervene as of right in the within action.

Rule 24 of the Federal Rules of Civil Procedure provides in applicable part as follows:

> "(a). *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action. . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

It is respectfully submitted that Green & White does not meet any of the requirements set forth in Rule 24. First of all, it is clear that the interests of Green & White were adequately represented by the Overmyer corporations. Not only are the Overmyer corporations affiliates of Green & White, but, in addition, the same attorneys represented both of them in the Courts below. That intervention should be denied under these circumstances was stated by the Court in the case of *Farmland Irrigation Co.* v. *Dopplmaier*, 220 F. 2d 247 (9 Cir. 1955) as follows:

> "The other requirement of Rule 24(a) is a showing by an applicant for intervention that the representation of his interest by existing parties is or may be inadequate. On this point Moore states: 'Inadequacy of representation is shown if there is proof

of collusion between the representative and an opposing party, if the representative has or represents some interest adverse to that of the applicant for intervention, or fails because of nonfeasance of his duty of representation.' See also comments of Moore and Levion the right to intervene under former Equity Rule 37 in 45 Yale L. Journal 565, 592. An example of adverse interest is found in the case of United States v. C. M. Lane Lifeboat Co., Inc., D. C. N. Y., 1938, 25 F. Suppl. 410, 411, where the court found inadequate representation because the applicant for intervention and the attorney representing his interests were not on friendly terms.

"In the case at bar, the appellant makes no charge of fraud or collusion nor does it charge Stout with an adverse interest. Comparing the answer of Stout with the answer that appellant filed with its motion to intervene, it is clear that the same defense will be presented whether or not the appellant is a formal party to the record. Indeed, not only would the defense of appellant be the same as Stout's, but also the attorneys who would present the defense. In addition, the docket entries reveal that these attorneys have diligently pursued the defense of the action on behalf of Stout, which negatives any possible contention of nonfeasance."

Also see, *Stadin* v. *Union Electric Company, et al.*, 309 F. 2d 912 (8th Cir. 1962) and *S. C. Johnson & Son, Inc.* v. *Boe*, 187 F. Supp. 517 (U. S. D. C. E. D. Pa. 1960).

In addition, the proposed intervenor complaint of Green & White clearly demonstrates that Green & White has no interest and claimed no interest in the cause of action commenced by the respondents. The only interest that Green & White had was with respect to its proposed claim. Such an interest has been held to be insufficient to support

a contention by an applicant for intervention that his interest is inadequately represented. In this connection the Court in the *Dopplmaier* case, *supra*, stated as follows:

> "The pleadings filed by appellant with its motion to intervene included a counterclaim in which it is alleged that a justifiable controversy exists between Farmland and Dopplmaier in that Dopplmaier has failed and refused to recognize Farmland as the successor to the rights of Stout under the license agreement referred to above. Applicant asserts that it is for the purpose of securing adjudication of that issue that it seeks to intervene, since it cannot secure such adjudication without intervention even by openly and avowedly controlling the defense of Stout. It is too clear for argument that the question of whether appellant is entitled to be adjudged successor to Stout is separate and distinct from the question of whether moneys are owing to Dopplmaier under his claim for an accounting. If the appellant were entitled to intervene because of inadequate representation of its interest in appellee's claim for an accounting, it might be that the issue raised in its counterclaim could be adjudged in the same proceeding. But it is the inadequate representation of its interest in the claim for an accounting, and not its interest in the counterclaim, that gives rise in the first instance to the right to intervene, for it is with respect to only such former interest that a judgment could result by which the appellant would be bound."

It should also be noted that notwithstanding the fact that Green & White sought to intervene as a plaintiff, its true purpose in seeking intervention was to support the position of the Overmyer corporations. This is made abundantly clear from the proposed intervenor complaint which contains nothing more than a claim against the

respondents. In the case of *Carey, Baxter & Kennedy, Inc.* v. *Wilshire Oil Company of Texas*, 346 F. 2d 110 (10th Cir. 1965), the Court held that such an interest in a pending action is insufficient to permit intervention, stating:

> "The significant fact here is that C.B.K. seeks to intervene on the side of the defendants.
>
> "C.B.K. does not assert a claim to the damages which Wilshire has demanded. They merely try to bolster the defense of Riffe and the only interest that C.B.K. has is indirect. If Riffe and Felts are made to respond in damages it could conceivably affect the relationship between C.B.K. and these defendants. Is such an indirect interest sufficient? We think not. The interests are those of Riffe and Felts, and not of C.B.K. The fact that C.B.K. also asserts a counterclaim is not a factor in assessing its right to intervene under Rule 24(a)."

A reading of the original motion by Green & White to intervene in the within action clearly demonstrates that it sought to intervene as a matter of right under Rule 24(a), Federal Rules of Civil Procedure, and did not seek intervention by permission of the Court under Rule 24(b), Federal Rules of Civil Procedure.

Even if Green & White's original motion to intervene could be considered as a motion to intervene by permission of the Court, it was properly denied. As is noted *supra*, the only interest of Green & White in this action is to use it as a vehicle for asserting a claim against the respondents. The courts have consistently denied intervention under such circumstances. *Kauffman* v. *Kebert*, 16 F. R. D. 225, aff'd 219 F. 2d 113 (3 Cir. 1955); Moore on *Federal Practice*, Vol. 4, par. 24.17 p. 126.

Intervention was also properly denied Green & White because at the time it made its motion to intervene it had a prior action pending against the respondents for the same claim. Green & White commenced an action against the respondents in the United States District Court for the District of Massachusetts on or about September 18, 1967, in which it alleged the identical claim pleaded in its proposed intervenor complaint. The within action was commenced by the respondents against the Overmyer Corporations in December, 1967, and the application of Green & White to intervene herein was not made until approximately October 11, 1968. Thus, the Massachusetts action commenced by Green & White against the respondents was commenced prior to the within action and for this reason the motion to intervene was properly denied. Such was the holding in *S. C. Johnson & Son, Inc.* v. *Boe, supra,* where the Court stated in part as follows:

> "Of more vital significance, however, is the fact that applicant's interest will be fully protected by virtue of the fact that they are defendants in the New York suit involving the same issues."

See also *Cresta Blanca Wine Co., Inc.* v. *Eastern Wine Corporation,* 143 F. 2d 1012 (2 Cir. 1944); and *Isbrandtsen Co.* v. *S. S. Kokoh Maru,* 263 F. Supp. 784 (U. S. D. C. S. D. N. Y. 1966).

POINT II

The motion of Green & White to intervene and the proposed intervenor complaint of Green & White could not be considered in opposition to the cross-motion for summary judgment.

Rule 56(e) of the Federal Rules of Civil Procedure provides as follows:

> "*Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall

> be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

It is respectfully submitted that this Rule expressly prohibits courts from considering the motion to intervene or the proposed intervenor complaint in ruling on a motion for summary judgment. It is obvious that the sole purpose of Green & White in seeking intervention was to prevent the cross-motion of the respondents for summary judgment and was an attempt by the Overmyer corporations to use the unsworn and unverified statements of the proposed intervenor complaint in opposition to the cross-motion for summary judgment.

It is further submitted that if there was any validity to the claims made in the proposed intervenor complaint of Green & White, the Overmyer corporations would have submitted competent evidence by way of affidavits, contracts and other documents to substantiate their contentions. Knowing that they could not produce such evidence

because it did not in fact exist, the Overmyer corporations attempted to accomplish by indirection what they were expressly prohibited from doing directly.

Thus, in view of the fact that the Overmyer corporations did not raise any issues of fact in the Court below, it had no alternative but to grant the cross-motion for summary judgment.

CONCLUSION

This Court should deny the Petition for a Writ of Certiorari on the ground that it has no basis in fact or law.

LESLIE A. HYNES,
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25 Broadway,
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Telephone: (212) 422-9424

WILLIAM D. POWERS,
of Counsel.

Complaint

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

[SAME TITLE]

The plaintiffs above named, by Leslie A. Hynes, their attorney, complaining of the above-named defendants allege:

FIRST: That plaintiffs Richard J. Woodward, Ned P. Clyde, James L. Sherard, Raymond Lundgren, Douglas C. Moorhouse and David M. Greer, doing business as Woodward-Clyde-Sherard & Associates, a partnership. having its principal office for the transaction of business at 277 Park Avenue, New York, New York, at all times hereinafter mentioned was and still is a partnership doing business under the firm name of Woodward-Clyde-Sherard & Associates.

SECOND: That defendant D. H. Overmyer Co., Inc. is an Ohio corporation, licensed to do business in the State of New York, having an office and place of business at 201 East 42nd Street, New York, New York, and shall hereinafter be referred to as "Overmyer Ohio".

THIRD: That defendant D. H. Overmyer Co., Inc. is a New York corporation having an office for the transaction of business at 201 East 42nd Street, New York. New York and shall hereinafter be referred to as "Overmyer New York".

FOURTH: That upon information and belief, Overmyer New York is a wholly owned subsidiary of Overmyer Ohio.

Complaint

FIFTH: That defendant The Seamen's Bank for Savings in the City of New York is a New York corporation having an office for the transaction of business at 30 Wall Street, New York, New York.

SIXTH: That defendant Quickway Excavators, Inc. is a New York corporation having an office for the transaction of business at 23 Abbott Drive, Town of Poestenkill, Rensselaer County, New York.

SEVENTH: That defendant Nuclear Corporation of America is a Delaware corporation licensed to do business in the State of New York.

EIGHTH: That defendant, M. Kramer & Sons, Inc. is a New York corporation having an office for the transaction of business at 91 Colvin Avenue, Albany, New York.

NINTH: That heretofore and on or about the 20th day of February, 1967, defendant Overmyer Ohio, by its President and its Secretary-Treasurer, for the purpose of securing the payment to plaintiffs of the sum of $243,654.35, executed and delivered to plaintiffs thirteen serial promissory notes in the total amount of $243,654.35, with interest thereon at the rate of 6% from February 20, 1967, in accordance with an agreement dated February 21, 1967. A copy of said agreement and notes are attached hereto, made a part hereof and marked Exhibit "A".

TENTH: That in said notes, it was expressly provided that in the event of the non-payment of any one of said series and such default continues for a period of sixty (60) days, then, at the option of the holder of any of said notes, all or any part of the remaining unpaid notes shall forthwith become due and payable.

ELEVENTH: That on the 23rd day of May, 1967, as collateral security for the payment of $183,654.35 (the principal amount of the then unpaid serial notes 5 to 13 inclusive) and interest thereon, defendant Overmyer New York, by its Vice President, duly made, executed and delivered to plaintiffs a mortgage, a copy of which is attached hereto, made a part hereof and marked Exhibit "B", whereby it mortgaged to the said plaintiffs the following described premises with the appurtenances thereto, described in the said mortgage as follows, to wit:

> "BEGINNING at an existing iron pipe marker in the Southwesterly line of Middle Road where said Southwesterly line is intersected by the Northwesterly line of lands now or formerly of Paige. said point of beginning being distant along the Southwesterly line of Middle Road Northwesterly about 648 feet from the Northwesterly line of New Karner Road (N. Y. S. Route 155) and runs thence along the Northwesterly line of lands now or formerly of Paige and through the lands of the New York Central and Hudson River Railroad Company South, 50 deg. 38 Min. West, nine hundred sixty-eight and sixteen hundredths feet (968.16') to a point; thence through the lands of the New York Central and Hudson River Railroad Company North 37 deg. 02 min. West. Three Hundred Thirty-three and seven tenths feet (333.7') to a point: thence through the lands of the New York Central and Hudson River Railroad Company and along the Southeasterly line of lands now or formerly of Henry P. Burroughs North 52 deg. 58 Min. East. nine hundred nine feet (909.0') to a point in the Southwesterly line of Middle Road; thence along said Southwesterly line of Middle Road South 48 deg. 15 min. East. three hundred feet (300.0') to

the point or place of beginning and containing about 6.776 acres of land.

TWELFTH: That said mortgage was duly recorded in the Office of the Clerk of the County of Albany on the 6th day of June, 1967, at 2:03 pm in Book #1894 of Mortgages, page 139, that being the County within which the said premises are located, and on information and belief, the mortgage tax due thereon was duly paid.

THIRTEENTH: That in said mortgage, defendant Overmyer New York covenants as follows:

"And the Mortgagor covenants with the Mortgage as follows:

1. That the Mortgagor will pay the indebtedness as hereinbefore provided."

* * * *

"4. That the whole of said principal sum and interest shall become due at the option of the Mortgagee; after default in the payment of any installment of principal or of interest for 60 days; or after default in the payment of any tax, water rate or assessment for 60 days after notice and demand; or after default after notice and demand either in assigning and delivering the policies insuring the buildings against loss by fire or in reimbursing the Mortgagee for premiums paid on such insurance, as hereinbefore provided, or after default upon request in furnishing a statement of the amount due on the bond and mortgage and whether any offsets or defenses exist against the mortgage debt, as hereinafter provided.

"5. That the holder of this mortgage, in any action to foreclose the mortgage, shall be entitled to the appointment of a receiver."

• • • •

"10. That this mortgage is subject and subordinate to a certain mortgage in the principal amount of $700,000.00 between D. H. Overmyer Co., Inc., a New York corporation, (formerly known as D. H. Overmyer Company, Inc.), as Mortgagor and Marine Midland National Bank of Troy, a national banking association, organized under the banking laws of the United States of America, having a principal office at Franklin Square, Troy, New York, which mortgage was dated January 3, 1966 and recorded January 3, 1966 in the Office of the County Clerk of Albany County, State of New York in mortgage Liber 1845, page 111. This mortgage was assigned to The Seamen's Bank for Savings in The City of New York, a New York corporation, having its principal office at 30 Wall Street, New York, New York, by an assignment executed October 20, 1966 and recorded October 27, 1966 in the Office of the County Clerk, Albany County, State of New York, in mortgage Liber 1876, page 337. Said mortgage was amended by a certain Agreement Extending Mortgage between D. H. Overmyer Co., Inc. and The Seamen's Bank for Savings in the City of New York, which Agreement was executed October 26, 1966."

FOURTEENTH: That defendant Overmyer Ohio, between February 20, 1967 and August 20, 1967, duly paid serial notes 1 to 7 in the total amount of $120,000.00 with interest thereon.

FIFTEENTH: That serial note numbered 8 in the principal amount of $20,000.00 due on September 20, 1967 was presented for payment by plaintiffs but payment was refused, as per the Notice of Protest attached hereto, made a part hereof and marked Exhibit "C".

SIXTEENTH: That there is now justly due plaintiffs upon said serial notes and mortgage the sum of $123,654.35, with interest thereon from the 20th day of February, 1967, at the rate of 6% per annum.

SEVENTEENTH: That the balance of aforesaid principal sum in the amount of $123,654.35 with interest thereon has become currently due and the mortgage is in default.

EIGHTEENTH: That plaintiffs have not assigned the aforesaid notes and mortgage and are the lawful owners and holders thereof.

NINETEENTH: No other action has been brought to collect the mortgage debt secured by the mortgage herein set forth.

TWENTIETH: That defendants, Quickway Excavators, Inc., Nuclear Corporation of America and M. Kramer & Sons, Inc. have or claim to have some interest or lien upon the said mortgaged premises or some part thereof, which interests or liens have accrued subsequent to the lien of the mortgage sought to be foreclosed in the within action, and/or are subordinate thereto.

TWENTY-FIRST: The State of New York and the State Tax Commission have or claim to have or may have some claim or lien against said mortgaged premises or some part thereof by reason of the fact that the corporation franchise or other taxes may be due to them from defendant Overmyer New York, which liens, if any, accrued

subsequent to the lien of the mortgage sought to be foreclosed herein and are subordinate thereto, and the People of the State of New York and the State Tax Commission are made parties hereto by reason thereof, and for no other reason.

WHEREFORE, plaintiffs demand judgment from the defendants and each of them, and all persons claiming under them, or any of them, subsequent to the commencement of this action and the filing of a notice of pendency thereof, be barred and foreclosed of and from all estate, right, claim, lien, interest, title and equity of redemption of, in and to the said mortgage premises and each and every part and parcel thereof; that the said premises may be decreed to be sold in one parcel according to law; that the moneys arising from the sale may be brought into Court; that the plaintiffs may be paid the amount due on the said notes and mortgage, with interest to the time of such payment and the expenses of such sale, together with the costs, allowances and disbursements of this action, so far as the amount of such moneys properly applicable thereto will pay the same; and that defendants Overmyer New York and Overmyer Ohio may be adjudged to pay any deficiency that may exist after the application of such moneys, the amount of such deficiency to be determined by the Court as provided in the Civil Practice Law and Rules of the State of New York, and that the plaintiffs may have such other and further relief in the premises as may be just and equitable.

LESLIE A. HYNES
Attorney for Plaintiffs
Office & P. O. Address
50 Broadway
New York 4, N. Y.

Exhibit A, Annexed to Complaint

LESLIE A. HYNES

COUNSELLOR AT LAW

50 Broadway

New York, N. Y. 10004

(212) HAnover 2-9424

Leslie A. Hynes
William Doyle Powers
Francis P. Donelan

February 21, 1967

E. M. Connery, Esq.
D. H. Overmyer Co., Inc.
201 East 42nd Street
New York, New York

Re: Woodward Clyde, Sherard & Associates
D. H. Overmyer Co., Inc.

Dear Mr. Connery:

This letter confirms and shall constitute our agreement to settle the existing debt owed to Woodward, Clyde, Sherard & Associates (hereinafter called "Creditor") in the sum of $243,654.35 which D. H. Overmyer Co., Inc., an Ohio corporation (hereinafter called "Debtor"), has agreed to pay.

In payment of this debt Debtor has agreed to issue thirteen serial notes to Creditor. The first note shall be in the sum of $10,000.00 and payable on February 20, 1967. The second note shall also be in the sum of

$10,000.00 and shall be payable on March 20, 1967. The third through twelfth notes shall be in the sum of $20,000.00 each and shall be payable monthly commencing April 20, 1967. The thirteenth note shall be in the sum of $23,654.35 and payable on February 20, 1968. All of the notes shall bear interest at the rate of 6% per annum from February 20, 1967. They shall also contain an acceleration provision which will, at Creditor's option, make all unpaid notes due and payable in the event that payment of any one of the notes is not made within sixty (60) days from its due date. It is understood and agreed by Creditor that Debtor shall have the right to prepay the notes without penalty.

It is further understood and agreed that Debtor, as security for the aforementioned debt, shall furnish the Creditor with a second mortgage to the full extent of the debt on improved real estate owned by the Debtor. The only lien against this real estate shall be a first mortgage. Debtor shall have until March 15, 1967 within which to select the real estate, which must be approved by the Creditor, and to furnish Creditor with the necessary legal documents. Creditor shall have the right to file the appropriate documents evidencing its rights in the real estate.

It is further agreed that Creditor shall continue to perform services in accordance with the terms and conditions of the Agreement entered into between Creditor and Green & White Construction Co. dated August 9, 1966. Debtor shall have sixty (60) days from the date on which invoices are received by Green & White Construction Company, Inc. the Creditor within which to make payment thereof.

Exhibit A, Annexed to Complaint

If the above meets with your understanding of our agreement please execute the enclosed copy of this letter and return it to the undersigned.

Very truly yours,

LESLIE A. HYNES
By William D. Powers

WDP:vj

Accepted

D. H. Overmyer Co., Inc.
By: (Illegible.)
Date: 2/21/67

Exhibit B, Annexed to Complaint

SECOND MORTGAGE

D. H. OVERMYER Co., Inc.,

to

WOODWARD-CLYDE, SHERARD & ASSOCIATES,

Dated: May 23, 1967

State of New York,
County of Albany, ss:

RECORDED on the day of A. D. 19 in Liber of Deeds at Page and examined.

CARTER & CONBOY
74 Chapel Street
Albany, New York

Clerk

Second Mortgage

THIS INDENTURE, made this 23rd day of May, 1967, between D. H. OVERMYER Co., Inc., a corporation organized under the Laws of the State of New York, whose principal place of business is 201 East 42nd Street, New York, New York 10017, hereinafter referred to as "Mortgagor" and WOODWARD-CLYDE, SHERARD & ASSOCIATES, a partnership with an office and place of business at 277 Park Avenue, New York, New York, hereinafter referred to as "Mortgagee".

Exhibit B, Annexed to Complaint

WITNESSETH:

THAT, WHEREAS, D. H. Overmyer Co., Inc., an Ohio corporation is justly indebted to the Mortgagee in the total principal sum of $243,654.35, which principal sum has been reduced to $183,654.35. This indebtedness is evidenced by serial notes executed by said D. H. Overmyer Co., Inc., an Ohio corporation, payable monthly at 6% interest per annum with the final payment to be made on February 20, 1968.

Payments of principal and interest due from time to time shall be paid at the offices of the Chemical Bank New York Trust Company, 277 Park Avenue, New York, New York.

NOW, THEREFORE, the Mortgagor, in order to secure the payment of said reduced indebtedness, together with interest thereon, in accordance with the terms of said notes, does hereby mortgage to the Mortgagee the following described real estate, situate, lying and being in the Town of Colonie, County of Albany, State of New York, described as follows:

> BEGINNING at an existing iron pipe marker in the Southwesterly line of Middle Road where said Southwesterly line is intersected by the Northwesterly line of lands now or formerly of Paige, said point of beginning being distance along the Southwesterly line of Middle Road Northwesterly about 648 feet from the Northwesterly line of New Karner Road (N.Y.S. Route 155) and runs thence along the Northwesterly line of lands now or formerly of Paige and through the lands of the New York Central and Hudson River Railroad Company South, 50 deg. 38 min. West, nine hundred sixty-eight and sixteen hundredths feet (968.16') to a

point: thence through the lands of the New York Central and Hudson River Railroad Company North 37 deg. 02 min. West, three Hundred Thirty-three and seven tenths feet (333.7') to a point; thence through the lands of the New York Central and Hudson River Railroad Company and along the Southeasterly line of lands now or formerly of Henry P. Burroughs North 52 deg. 58 min. East, nine hundred nine feet (909.0') to a point in the Southwesterly line of Middle Road; thence along said Southwesterly line of Middle Road South 48 deg. 15 min. East, three hundred feet (300.0') to the point or place of beginning and containing about 6.776 acres of land.

And the Mortgagor covenants with the Mortgagee as follows:

1. That the Mortgagor will pay the indebtedness as hereinbefore provided.

2. That the Mortgagor will keep the buildings on the premises insured against loss by fire for the benefit of the Mortgagee; that he will assign and deliver the policies to the Mortgagee; and that he will reimburse the Mortgagee for any premiums paid for insurance made by the Mortgagee on the Mortgagor's default in so insuring the buildings or in so assigning and delivering the policies.

3. That no building on the premises shall be removed or demolished without the consent of the Mortgagee.

4. That the whole of said principal sum and interest shall become due an the option of the Mortgagee; after default in the payment of any installment of principal or of interest for 60 days; or after default in the pay-

ment of any tax, water rate or assessment for 60 days after notice and demand; or after default after notice and demand either in assigning and delivering the policies insuring the buildings against loss by fire or in reimbursing the Mortgagee for premiums paid on such insurance, as hereinbefore provided; or after default upon request in furnishing a statement of the amount due on the bond and mortgage and whether any offsets or defenses exist against the mortgage debt, as hereinafter provided.

5. That the holder of this mortgage, in any action to foreclose the mortgage, shall be entitled to the appointment of a receiver.

6. That the Mortgagor will pay all taxes, assessments or water rates, and in default thereof, the Mortgagee may pay the same.

7. That the Mortgagor within 30 days upon request in person or within 30 days upon request by mail will furnish a written statement duly acknowledged of the amount due on this bond and mortgage and whether any offsets or defenses exist against the mortgage debt.

8. That notice and demand or request may be in writing and may be served in person or by mail.

9. That the Mortgagor warrants the title to the premises.

10. That this mortgage is subject and subordinate to a certain mortgage in the principal amount of $700,000.00 between D. H. Overmyer Co., Inc., a New York corporation, (formerly known as D. H. Overmyer Company, Inc.), as Mortgagor and Marine Midland National Bank of Troy, a national banking association, organized under

the banking laws of the United States of America, having a principal office at Franklin Square, Troy, New York, which mortgage was dated January 3, 1966 and recorded January 3, 1966 in the Office of the County Clerk of Albany County, State of New York in mortgage Liber 1845, page 111. This mortgage was assigned to The Seamen's Bank for Savings in The City of New York, a New York corporation, having its principal office at 30 Wall Street, New York, by an assignment executed October 20, 1966 and recorded October 27, 1966 in the office of the County Clerk, Albany County, State of New York, in mortgage Liber 1876, page 337. Said mortgage was amended by a certain Agreement Extending Mortgage between D. H. Overmyer Co., Inc., and The Seamen's Bank For Savings In The City of New York, which Agreement was executed October 26, 1966.

11. That the Mortgagor or its assigns or the holder of the serial notes were secured by this mortgage (or its assigns), shall at any time, before February 20, 1968, have the privilege to pre-pay the entire principal balance of this mortgagee (with interest) on giving five days notice in writing to the Mortgagee, or its assigns of intention to do so.

D. H. Overmyer Co., Inc.
G. R. Silcox
Vice-President

In the presence of:

Attest:

A. Roger Milio
Assistant-Secretary

Exhibit B, Annexed to Complaint

State of New York
County of New York

On the 23rd day of May, in the year 1967, before me personally came G. R. Silcox, to me known, who being by me duly sworn, did depose and say that he resides in Seven Echo Drive, Darien, Connecticut; that he is the Vice President of D. H. Overmyer Co., Inc., the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation; and that he signed his name thereto by like order.

PHYLLIS PRESSLER
Notary Public, State of New York
No. 30-3157385
Qualified in Nassau County
Commission Expires March 30 1969
Certified in N. Y. County

Affidavit of James H. Reidy in Support of Proposed Order on Motion for Rehearing of Motion to Intervene

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York,
County of New York, ss:

JAMES H. REIDY, being duly sworn, deposes and says that he is an attorney at law, duly admitted to practice law in the State of New York and that he is of counsel to E. M. Connery, Esq., the General Counsel of defendants, D. H. Overmyer Co., Inc., of New York and Ohio (hereinafter collectively referred to as Overmyer.) The New York corporation is a wholly owned subsidiary of the Ohio corporation.

This affidavit is submitted in support of Overmyer's proposed order, submitted herewith, on this court's decision rendered from the bench on January 5, 1970, on the motions by Overmyer and proposed intervenor Green & White Construction Co., Inc., for renewal of the motion for an order to permit Green & White to intervene as a plaintiff and to stay the summary judgment awarded to plaintiffs.

The proposed order submitted herewith contains, among other things, a decretal paragraph permitting Overmyer to serve and file an answer to the complaint containing counterclaims against the plaintiffs. Such a proposed order is submitted in the interests of justice in view of the somewhat unique history of this litigation which is summarized below.

On or about September 18, 1967, Green & White Construction Co., Inc., commenced an action against Douglas C. Moorhouse and David M. Greer, two of the part-

ners of the plaintiff partnership in the suit at bar. That Green & White action was brought in the United States District Court, District of Massachusetts. The complaint alleged that the defendants were guilty of professional malpractice, which is more clearly described below.

Moorhouse and Greer moved to dismiss the complaint for improper service of process and the motion was granted with leave to amend the complaint. In the interim, Woodward-Clyde-Sherard (hereinafter called W-C-S) commenced its own action in the Supreme Court, County of Albany, State of New York, on December 13, 1967 seeking foreclosure of a mortgage on an Overmyer warehouse. That action was removed to this court on December 30, 1967 upon petition of Overmyer based upon diversity of citizenship (recently Overmyer learned for the first time that the plaintiff partnership was formed under the laws of the State of New York. This raises some doubt about federal jurisdiction).

On December 30, 1967, Overmyer made a motion to dismiss the complaint and thereafter also moved for change of venue. By the service of such motions, the time for Overmyer to answer the complaint was extended by Rule 12, F.R.C.P., to "10 days after notice of the court's action" on the motions.

Before the motions for change of venue and for dismissal of the complaint were decided, the plaintiff, on June 10, 1968, moved for summary judgment, styling it as a "cross-motion". Thereafter, Overmyer moved for an order permitting Green & White to intervene and assert against the plaintiff the professional malpractice causes of action.

This court decided all pending motions on November 20, 1969, in one decision. That decision constituted an order respecting the denial of the motions for dismissal of the complaint, intervention and change of venue. The

parties were instructed to settle an order respecting the decision granting plaintiff's motion for summary judgment. The order and judgment of foreclosure and sale (based upon plaintiffs motion for summary judgment) was signed and filed on January 23, 1970. In the interim, between November 20, 1969 decision and the January 23, 1970 order, Overmyer moved for renewal of the motion for intervention and for a stay of summary judgment. Those motions were denied from the bench on January 5, 1970 with instructions to counsel to "settle order". This affidavit and the annexed proposed order are in compliance with that direction.

The affidavits submitted by the defendants on the various motions are replete with references to allegations of negligence, breach of contract and, as perhaps more aptly described, professional malpractice of plaintiffs. The factual basis of these allegations is that the proposed intervenor, Green & White, retained the plaintiffs as professional engineers to make borings and subsurface studies and other related tasks relative to an area in Framingham, Massachusetts, known as sites Nos. 6 & 7. The plaintiffs in this action, either alone or in concent with a subcontractor retained by plaintiffs, allegedly negligently, carelessly and unprofessionally performed their work which resulted in damages of $300,000.

It is anticipated herein that the plaintiffs will raise an objection to which they have alluded in the past concerning the ownership of this professional malpractice claim. Before discussing the legalities of this issue, it is respectfully submitted that the practical business aspects should be first considered.

In about February of 1968, Overmyer (Ohio) assumed liabilities of Green & White and thereby became entitled to receivables and other claims in favor of Green & White.

Affidavit of James H. Reidy in Support of Proposed Order

At the commencement of the within litigation, it was decided to leave the claim against W-C-S in the name of Green & White because the motions made by Overmyer relieved it of the necessity of serving an answer to the complaint which would then have had to include all known counterclaims. In addition, this procedure was consistent with the fact that Green & White had previously commenced litigation in Massachusetts against W-C-S on this claim. Therefore, before the motions of Overmyer were decided, Overmyer moved also for an order permitting Green & White to intervene and assert the professional malpractice claim against plaintiff. The resistance of the partners of W-C-S in Massachusetts made this the most practical solution to that potentially difficult jurisdiction issue. When the Massachusetts action finally was discontinued, there was no longer any great need for the claim to remain in the hands of Green & White, unless the motion for intervention was granted.

Unfortunately, all of the motions were decided at one time. In effect, on November 20, 1969, Overmyer was informed that the professional malpractice claim could not be asserted by Green & White (by way of intervention), and that it was now also too late for Overmyer to assert the claim, as had been its right.

In the affidavit of Edmund M. Connery, Esq., submitted in support of the renewal motion, he indicated the desire of Overmyer to assert the professional malpractice claim in its own name, if intervention was to be ultimately denied. Mr. Connery stated:

"Overmyer, Ohio, which owns all the stock in affiliates of the same name in other States, in February, 1968, assumed all liabilities of Green & White and in consideration therefore became entitled to all the claims

and accounts receivable of said Green & White, liquidated and unliquidated."

"In order to make said transfer effective, Green & White and Overmyer of Ohio adopted resolutions by their respective Boards of Directors transferring this specific claim against W-C-S to Overmyer, Ohio, which owns all of the stock in Overmyer, New York."

"It is the purpose of this assignment to express the true ownership of this claim, and make possible its satisfaction by decision of this Court which has jurisdiction of the W-C-S partnership."

The engagement of Green & White by plaintiffs was in April of 1965. There is some question as to what jurisdiction's statute of limitations controls. It is possible that if Overmyer is not permitted to assert the professional malpractice claim against plaintiff in this action that it may be barred from doing so in a plenary action in this or some other jurisdiction. On the other hand, if a counterclaim is now permitted, the date the action was "commenced" under the laws of the state whose statute of limitations may control would be the date upon which a claim was first referred to in this litigation (or perhaps even when the action was commenced.) This would appear to be so because in a summary judgment motion made prior to joinder of issue the opposing affidavits are in lieu of the pleadings.

It may thus be crucial to Overmyer that it be allowed to assert the counterclaims in this action to avoid the bar of the statute of limitations. In addition, it would appear to be the fairest way to resolve all of the issues between the parties. I have been informed that the Overmyer corporations have other subsequent recently discovered professional malpractice claims at other sites, which will also be asserted against the plaintiffs in this

action. It would certainly seem to be the fairest procedure to all parties to have such additional claims asserted herein rather than in some other jurisdiction(s). Furthermore, and perhaps as the paramount reason, *but for* the coincidence that the motion for summary judgment was granted to the plaintiff before defendants had an opportunity to answer and assert counterclaims, a stay of the order and judgment of foreclosure could have been granted by this court under Rules 54 (b) and 62 (h) F.R.C.P., pending determination of the counterclaims. Indeed, it is the intention of Overmyer to ask for such a stay if this court permits counterclaims to be asserted at this time and if no stay is then in effect.

It is respectfully prayed that the court sign the annexed proposed order to permit the defendants an opportunity to raise counterclaims which it would be able to do but for the coincidence in timing of the decisions on the motions referred to above.

JAMES H. REIDY

(Sworn to January 30, 1970)

Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3172

Plaintiff Demands Trial by Jury

D. H. OVERMYER CO., INC., an Ohio Corporation, individually and as assignee of D. H. Overmyer Co., Inc., a Utah corporation, D. H. Overmyer Co., Inc., a Massachusetts corporation, and Green and White Construction Co., Inc., a Delaware corporation,

Plaintiff,

against

RICHARD J. WOODWARD, NED P. CLYDE, JAMES L. SHERARD, RAYMOND LUNDGREN, DOUGLAS C. MOOREHOUSE, and DAVID M. GREER, doing business as WOODWARD-CLYDE-SHERARD & ASSOCIATES, a partnership,

Defendants.

Plaintiff, by its attorneys, Gerard L. Goettel and James H. Reidy, complaining of defendants, alleges, upon information and belief, as follows:

AS AND FOR A FIRST CAUSE OF ACTION

1. At all pertinent times, plaintiff was and still is a corporation duly organized and existing under and pursuant to the laws of the State of Ohio and licensed to do business in the State of New York.

2. At all pertinent times, Green and White Construction Company, Inc. ("Green & White") was and still is a corporation duly organized and existing under and pursuant to the laws of the State of Delaware.

3. At all pertinent times, D. H. Overmyer Co., Inc., a Utah corporation, ("Overmyer Utah") was and still is a corporation duly organized and existing under and pursuant to the laws of the State of Utah.

4. At all pertinent times, D. H. Overmyer Co., Inc., a Massachusetts corporation ("Overmyer Massachusetts") was and still is a corporation duly organized and existing under and pursuant to the laws of the Commonwealth of Massachusetts.

5. On or about June 16, 1970, Overmyer Massachusetts and Overmyer Utah, for a valuable consideration, assigned to plaintiff all of their right, title and interest in and to all claims they held against the defendants.

6. On or about February 15, 1968, Green & White for a valuable consideration, assigned to plaintiff all of its right, title and interest in and to all claims they held against the defendants.

7. At all pertinent times, the defendants did business as a partnership under the firm name of Woodward-Clyde-Sherard & Associates and held themselves out as qualified engineers with the requisite skills, qualifications, and knowledge to perform sub-surface and soil tests, to determine the geological suitability of tested land areas for construction of buildings and other improvements, and to perform and review other tests and studies in relation thereto.

8. In or about April 1966, the defendants entered into an agreement with Green & White, wherein and whereby, for a monetary consideration, defendants agreed to test for geological suitability for the construction of warehouse facilities and to perform other services in regard thereto an area on New York Avenue, Framingham, Massachusetts designated by Green & White as Sites Nos. 6 and 7, comprising approximately 14½ acres of land.

9. The defendants breached said agreement by: failing to perform the necessary tests to determine the suitability of the aforesaid area for construction of the contemplated warehouse facilities; failing to use their knowledge, skills and experience in properly performing said tests; in failing to notify plaintiff's assignors of the unsuitability of the area for construction of warehouse premises; in failing to properly inspect the sites; in failing to supervise the testing procedures; all of which it had promised and agreed to perform; and in otherwise breaching the letter and spirit of said agreement; and the defendants negligntly, carelessly and unskillfully performed their duties without exercising the normal skills of their profession; all to the damage and detriment of plaintiff, without any negligence of plaintiff or its assignors contributing thereto.

10. By reason of the foregoing, plaintiff has been damaged to the extent of $300,000.00 (Three Hundred Thousand Dollars).

AS AND FOR A SECOND CAUSE OF ACTION

11. Plaintiff repeats and realleges each and every allegation contained in paragraphs numbered 1 through 7 of this complaint with the same force and effect as if set forth here at length.

12. In or about October, 1965, the defendants entered into an agreement with Green & White, wherein and whereby, for a monetary consideration, defendants agreed to test for geological suitability for the construction of warehouse facilities and to perform other services in regard thereto an area in Everett, Mass., designated by Green & White as Site No. 2.

13. The defendants breached said agreement by: failing to perform the necessary tests to determine the suitability of the aforesaid area for construction of the contemplated warehouse facilities; failing to use their knowledge, skills and experience in properly preforming said tests; in failing to notify plaintiff's assgnors of the unsuitability of the area for construction of warehouse premises; in failing to properly inspect the site; in failing to supervise the testing procedures; all of which it had promised and agreed to perform; and in otherwise breaching the letter and spirit of said agreement; and the defendants negligently, carelessly and unskillfully performed their duties without exercising the normal skills of their profession; all to the damage and detriment of plaintiff, without any negligence of plaintiff or its assignors contributing thereto.

14. By reason of the foregoing, plaintiff has been damaged to the extent of $100,000.00 (One Hundred Thousand Dollars).

AS AND FOR A THIRD CAUSE OF ACTION

15. Plaintiff repeats and realleges each and every allegation contained in paragraphs numbered 1 through 7 of this complaint with the same force and effect as if set forth here at length.

16. In or about February, 1966, the defendants entered into an agreement with Green & White, wherein and whereby, for a monetary consideration, defendants agreed to test for geological suitability for the construction of warehouse facilities and to perform other services in regard thereto an area in North Salt Lake, Utah.

17. The defendants breached said agreement by: failing to perform the necessary tests to determine the suitability of the aforesaid area for construction of the contemplated warehouse facilities; failing to use their knowledge, skills and experience in properly performing said tests; in failing to notify plaintiff's assignor of the unsuitability of the area for construction of warehouse premises; in failing to properly inspect the site; in failing to supervise the testing procedures; all of which it had promised and agreed to perform; and in otherwise breaching the letter and spirit of said agreement; and the defendants negligently, carelessly, and unskillfully performed their duties without exercising the normal skills of their profession; all to the damage and detriment of plaintiff, without any negligence of plaintiff or its assignors contributing thereto.

18. By reason of the foregoing, plaintiff has been damaged to the extent of $250,000.00 (Two Hundred and Fifty Thousand Dollars).

WHEREFORE, plaintiff demands judgment against the defendants:

1) On the First Cause of Action in the sum of Three Hundred Thousand Dollars ($300,000.00).

2) On the Second Cause of Action in the sum of One Hundred Thousand Dollars ($100,000.00).

Complaint

3) On the Third Cause of Action in the sum of Two Hundred and Fifty Thousand Dollars ($250,000.00).

4) With interest, costs and disbursements in this action.

GERALD L. GOETTEL and
JAMES H. REIDY, ESQS.
Attorneys for Plaintiff

By JAMES H. REIDY
JAMES H. REIDY
Office & Post Office Address
201 East 42nd Street
New York, N. Y. 10017

To:

LESLIE A. HYNES, ESQ.
Attorney for Defendants
Office & Post Office Address
25 Broadway
New York, N. Y. 10006